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CASES DETERMINED

BY THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS

OF THE

STATE OF MISSOURI,

NOVEMBER 28, 1904. TO FEBRUARY 27, 1905.

REPORTED FOR THE
ST. LOUIS COURT OF APPEALS
BY JOHN TURNER WHITE, of the Springfield Bar,
AND FOR THE
KANSAS CITY COURT OF APPEALS
BY BEN ELI GUTHRIE, of the Macon Bar,
OFFICIAL REPORTERS.

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JUDGES OF THE ST. LOUIS COURT OF APPEALS.

HON. CHARLES C. BLAND, *Presiding Judge.*

HON. RICHARD L. GOODE, } *Judges.*
HON. ALBERT D. NORTONI, }

JOHN H. MURPHY, *Clerk.*

JOHN TURNER WHITE, *Reporter.*

JUDGES OF THE KANSAS CITY COURT OF APPEALS.

HON. JACKSON L. SMITH, *Presiding Judge.* To December 31, 1904.

HON. ELBRIDGE J. BROADDUS, *Presiding Judge* From January 1, 1905.

HON. JAMES ELLISON, } *Judges.*
HON. J. M. JOHNSON, }

L. F. MCCOY, *Clerk.*

BEN ELI GUTHRIE, *Reporter.*

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CASES DETERMINED

BY THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1904.

(Continued from Volume 109.)

JAMES T. BEATTY, Respondent, v. A. P. CLARKSON, Appellant.

Kansas City Court of Appeals, November 28, 1904.

1. **PARTNERSHIP: What Is Not: Crop.** Where the object is to divide the crop between the parties it is not a partnership.
2. ———: ———: **Testimony.** A partnership does not exist between parties associated in a common undertaking unless each has the right to manage the whole business and to dispose of the entire property involved in the enterprise; and evidence and the record fails to show a partnership between plaintiff and defendant.
3. ———: ———: **Instruction.** It is not error to refuse an instruction included in others.
4. **APPELLATE AND TRIAL PRACTICE: Attorney and Client: Misconduct: Harmless Error.** It is highly improper for the plaintiff's attorney in his closing speech to call the jury's attention to the verdict in the justice's court, but where the error is entirely harmless it is not cause for reversal.

On Motion for Rehearing.

5. **REPLEVIN: Partial Finding for Plaintiff: Judgment: Appellate Practice.** Where the jury finds that only a part of the replevined property belongs to plaintiff, the defendant is entitled to a

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judgment against plaintiff and his sureties for the remaining articles; but he should call the trial court's attention thereto in a proper manner and can not raise the point for the first time in the appellate court.

Appeal from Boone Circuit Court.—*Hon. John A. Hockaday,* Judge.

AFFIRMED.

N. T. Gentry and *Wellington Gordon* for appellant.

(1) The court erred in overruling defendant's demurrer at the close of plaintiff's evidence, and also at the close of all the evidence. As there was a partnership existing between plaintiff and defendant, in regard to the hogs and corn, the plaintiff's suit could not be maintained, and the justice of the peace had no jurisdiction, as there had been no settlement of their partnership affairs. Newberger v. Friede, 23 Mo. App. 631; Rankin v. Fairley, 29 Mo. App. 593. (2) As a suit between partners would be equitable in its nature, the justice had no jurisdiction over this controversy. Sandidge v. Hill, 70 Mo. App. 71; Kelchner v. Morris, 75 Mo. App. 589; Morris v. McMahan, 75 Mo. App. 499. (3) If the justice had no jurisdiction over the subject-matter, the circuit court acquired none by reason of the appeal. Haggard v. Railroad, 63 Mo. 302; Gist v. Loring, 60 Mo. 487; McQuiod v. Lamb, 19 Mo. App. 153; Bank v. Doak, 75 Mo. App. 332. (4) Besides, an action of replevin can not be maintained by one joint owner against another. Miller v. Crigler, 83 Mo. App. 406; Pulliam v. Burlingame, 81 Mo. 111; Spooner v. Ross, 24 Mo. App. 598; Fleming v. Clark, 22 Mo. App. 218. (5) Error was committed in the giving of plaintiff's instruction numbered 3. (6) Error was also committed by the trial court in refusing defendant's instruction numbered 2. Ingals v. Ferguson, 138 Mo. 358; Westbay v. Milligan, 89 Mo. App. 294; Miller v. Crigler,

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supra; Cobbey on Replevin, sec. 229; Freeman on Co-tenants, sec. 289; Cross v. Hulett, 53 Mo. 398. (7) We submit that the defendant was prejudiced by improper remarks of plaintiff's counsel in his closing argument. Evans v. Trenton, 112 Mo. 390; Haynes v. Trenton, 108 Mo. 123; Ritter v. Bank, 87 Mo. 574; Wilbur v. Railroad, 48 Mo. App. 224; Norton v. Railroad, 40 Mo. App. 642; Marble v. Walters, 19 Mo. App. 134; Gibson v. Zeibig, 24 Mo. App. 65; McDonald v. Cash, 45 Mo. App. 80; Holliday v. Jackson, 21 Mo. App. 660. (8) The jury by its verdict, gave plaintiff the hogs, corn, millet seed, plow, over-jet and wagon bows, but made no finding as to the two steers, stack of hay and cord wood. Thereupon, the trial court entered up judgment in favor of plaintiff for the property mentioned in the verdict, but nothing was said in the judgment about the steers, hay and cord wood. The defendant was entitled to have a judgment in his favor for the property which the jury decided did not belong to the plaintiff. Hitch v. Heiman, 81 Mo. App. 370; Ingalls v. Ferguson, 138 Mo. 368; Updyke v. Wheeler, 37 Mo. App. 685; Wells on Replevin, sec. 744.

J. L. Stephens for respondent.

(1) The court overruled the demurrer because having heard the entire testimony, it found there was no partnership interests in the property. (2) As to the second error wherein complaint is made of instruction numbered 3, this instruction, plainly and fully declares the law of the case. (3) Attorneys for appellant complain of the court's refusal to give instruction numbered 2 offered by appellant.

BROADDUS, J.—This is a suit in replevin for the following personal property, viz.: Six Berkshire pigs; two Poland China brood sows; seven Poland China shoats; four spotted Poland China shoats; five

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suckling pigs; three half-breed Poland China pigs; two yearling steers, one brindle and one short horn and Jersey; 1 stack of hay; 25 bushels shucked corn in the crib; 1 side-breaking plow; one-half interest in 4 cords of wood; 2 bushels of millet; and one over-jet and bows for wagon. The case originated in a justice's court where it was tried and then appealed to the circuit court where the judgment was for plaintiff, from which defendant appealed to this court.

The chief ground urged for reversal is that the evidence showed that the property claimed was partnership property; therefore, the plaintiff not being entitled to the sole and exclusive possession, could not recover. Plaintiff's evidence tended to show that defendant had no interest in any of the property, but that plaintiff was the sole and exclusive owner thereof, except as to the wood and the hay. Plaintiff's evidence as to the wood was that if he would cut it he was to have one-half and defendant the other half; and as to the hay, it was cut on shares with the agreement that the parties should share alike. There was evidence that there was a crib of corn which was called partnership corn by plaintiff and that he fed his hogs from this crib, but this corn was consumed and is in no way involved in this suit.

The evidence of defendant was that he made a verbal contract with plaintiff to the effect that he would give him one-half of what was raised on the place; that the agreement was that the wood was to be cut on shares; and that the hay was to be harvested on a similar agreement. He also testified that he furnished plaintiff the money to buy one sow, and part of the purchase price of another. Also, that the corn raised on the farm was gathered and put in three pens, one for plaintiff, one for defendant and one called the "partnership crib;" that the hogs were fed out of the last named crib until the corn was exhausted, when they were then fed half from his crib and half from

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plaintiff's crib; and that the hay was divided and that plaintiff replevied his stack. This the plaintiff admits, but testified that as defendant took his stack he replevied the other belonging to the defendant. The jury in its verdict failed to find that plaintiff was entitled to the possession of the hay and wood sued for, but found for him for the other property specified.

We do not think the facts showed that a partnership existed between the parties. "Where the object is to divide the crop in kind between the parties, it is not a partnership." [Parsons on Partnership, sec. 61 and note; Donnell v. Harshe, 67 Mo. 170.] In this case the question was fully discussed and afterwards commented on in Ashly v. Shaw, 82 Mo. 76 and approved, wherein the court defined what was not a partnership, viz.: "The relation of partnership does not exist between persons associated in a common undertaking, unless each one has the right to manage the whole business and to dispose of the entire property involved in the enterprise for its purpose, in the same manner and with the same power as all can when acting together." Taking the evidence of the respective parties to the suit, it does not appear that they were partners. Their interests in the animals and crops was in shares. There was no common property which either had the right to manage or sell.

As to that part of the property recovered by plaintiff, the evidence tended to show that defendant had no interest in it whatever. It was a question for the jury to determine whether the plaintiff was entitled to the sole possession of the property; and as it found for him upon the testimony in the case, the finding is conclusive upon this court as it was supported by substantial evidence. In fact, we do not see how the finding could have been otherwise, in view of the opinion heretofore expressed that there was no partnership involved in the issue.

The instructions of the court fairly and correctly

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defined the issue to be tried. And we do not think that there was any error committed in the refusal of defendant's second instruction, as all it contained was substantially included in number one given in his behalf, and in number two given for plaintiff. But with the view we have of the law of the case it was immaterial as under the evidence and the law the verdict in any event should have been for the plaintiff.

The conduct of plaintiff's attorney in calling attention to the verdict of the jury in the justice's court was highly improper and he should have received a severe reprimand from the court for his conduct. But as a verdict for the plaintiff was inevitable, the matter is not a cause for reversal.

Affirmed. All concur.

OPINION ON MOTION FOR REHEARING.

BROADDUS, J.—The appellant insists that as the plaintiff only recovered for a part of the articles of property sued for, there should have been a judgment in defendant's favor against plaintiff and his sureties on the bond for the remaining articles replevied. The defendant was entitled to such judgment. [Updyke v. Wheeler, 37 Mo. App. 680; Ingals v. Ferguson, 138 Mo. 368; Hecht v. Heiman, 81 Mo. App. 370.]

But defendant is in no position to raise the question on his appeal. He failed to call attention to the matter in either his motion for a new trial or in arrest of judgment. No doubt the trial court would have properly instructed the jury, if so requested, and would have entered the proper judgment if it had been asked to do so.

The question was raised for the first time in this court. It is too late as we have no power to afford the redress asked by the defendant.

Motion overruled.

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STATE OF MISSOURI, Appellant, v. B. D. SCHLEUTER, Respondent.

Kansas City Court of Appeals, November 28, 1904.

1. **INDICTMENT: Dramshop Keeper: Open on Sunday: Duplicity.** An indictment under section 3011, Revised Statutes 1899, charging a dramshop keeper with keeping open his dramshop and selling and giving away and suffering to be sold and given away, etc., intoxicating liquors on Sunday, etc., is sufficient and not subject to the objection of duplicity. State v. Ambs, 20 Mo. 214, distinguished.

2. ——: ——: ——: ——. In such indictment it is not necessary to use the word "unlawfully" since the statute does not use it.

Appeal from Cole Circuit Court.—*Hon. James E. Hazell,* Judge.

REVERSED AND REMANDED.

Edward C. Crow, Attorney-General, for appellant.

(1) Counsel for appellant contend that this indictment is insufficient, for the reason that it is multifarious and contains different offenses charged in one count. The case of State v. Ambs, 20 Mo. 214, cited by counsel for respondent, was not one based upon the same statute as is the indictment in the case at bar. The act in the case of State v. Ambs, first appeared in R. S. 1825, c. 1, Crimes & Misdemeanors, sec. 92. (2) Although section 3011 makes punishable the doing of one thing and another, specifying a considerable number, yet there is but one offense which may be committed in different ways, and may all be charged in a single count, provided the conjunction "and" is placed in the indictment, instead of the word "or," as used in the statutes. 1 Bishop's New Criminal Procedure, secs. 436, 437, 438, 439, 440 and 586; Com. v. Eaton, 15 Pick.

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273; Com. v. Nichols, 10 Allen 199; Com. v. Brown, 14 Gray 419; Stephens v. Com., 16 Metc. 241; Byrne v. State, 12 Wis. 519; Com. v. Lufkin, 7 Allen 579; State v. Bielby, 21 Wis. 204; Oleson v. State, 20 Wis. 38; Com. v. McLaughlin, 12 Cush. 615; Bishop's Criminal Proc. (4 Ed.), 438; State v. Edmonson, 43 Tex. 162; Barnes v. State, 20 Conn. 235; 1 Bishop's Criminal Proc. 438. (3) Alternative offenses—if, as is common in legislation, a statute makes it punishable to do a particular thing specified or another thing or another, one commits but one offense who does any one of the things or any two or more or all of them. Carrico v. State, 11 Mo. 579; Com. v. Loring, 8 Pick. 370; State v. Layman, 8 Blatchf. 330; State v. Carney, 1 Hawks 53; Com. v. Clapp, 5 Pick. 41; Com. v. Burns, 4 J. J. Mar. 177; Davenport v. Com., 1 Leigh 588; Rex v. Dixon, Russ Nry 53; State v. Murphy, 6 Ala. 845; State v. Hull, 21 Me. 84; Angel v. See, 2 B. A. Cas. 231; State v. Murphy, 6 Ala. 845; Morney v. State, 8 Ala. 328; McElhaney v. State, 24 Ala. 71; Bishop's Statutory Crimes (3 Ed.), sec. 244; Bishop's Statutory Crimes, secs. 244, 701; Bishop's Criminal Procedure, sec. 489-92, 586, 587; U. S. v. Millard, 13 Blatchf. 534; State v. Fancher, 71 Mo. 460. (4) The word "unlawful" is not essential or necessary to the validity of the indictment. Wharton's Criminal Pleading and Practice (8 Ed.), 269; State v. Bray, 1 Mo. 180; State v. McWaters, 10 Mo. 168.

W. S. Pope for respondent.

(1) The first contention of the defendant is, that the indictment is bad for multifariousness. Several different offenses are attempted to be charged in one count. The same character of evidence will not convict on any two of the counts. State v. Ambs, 20 Mo. 214; R. S. 1899, sec. 2524. (2) The evidence required to convict defendant of these separate offenses is clearly

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of a different character. Different proof would be required to convict under each subdivision of the section under which defendant is indicted (section 3011, R. S. 1899). Defendant should have been charged in separate counts, and a timely motion to quash sustained. 1 Bishop on Crim. Proc., sec. 446; 1 Bishop on Crim. Proc. (3 Ed.), sec. 432; 1 Wharton, Cr. Plead., sec. 255; State v. Apperger, 80 Mo. 173; State v. Ambs, 20 Mo. 214; State v. Fox, 148 Mo. 525; State v. Nitch, 79 Mo. App. 99; State v. Young, 70 Mo. App. 52; R. S. 1899, secs. 2523, 2524, 2525, 2535. (3) The next and most serious objection to the indictment, however, is that it does not charge that the acts complained of were done either willfully or unlawfully. It is true that in the case of State v. Freeze, 30 Mo. App. 347, an indictment in the language of the one at bar, was held good by Judge PEERS, but an inspection of the record in that case will show that the question here raised was not before the court. State v. Brown, 8 Mo. 210; State v. Meagher, 49 Mo. App. 571; State v. Young, 73 Mo. App. 602; State v. Apperger, 80 Mo. 173; State v. Neals, 10 Mo. 498; State v. Larimore, 20 Mo. 426; State v. Runyan, 26 Mo. 168; State v. Andrews, 26 Mo. 170; State v. Hornbeck, 15 Mo. 479; State v. Wishon, 15 Mo. 504; State v. Cox, 29 Mo. 475; State v. Fanning, 38 Mo. 409; State v. Fanning, 38 Mo. 359.

ELLISON, J.—The defendant was indicted, tried and convicted for violating section 3011, Revised Statutes 1899, reading as follows:

"Any person having a license as a dramshop keeper, who shall keep open such dramshop, or shall sell, give away or otherwise dispose of, or suffer the same to be done upon or about his premises, any intoxicating liquors, in any quantity, on the first day of the week, commonly called Sunday, or upon the day of any general election in this State, shall, upon conviction thereof, be punished by a fine not less than fifty

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nor more than two hundred dollars, shall forfeit such license, and shall not again be allowed to obtain a license to keep a dramshop for the term of two years next thereafter."

The indictment is in the following words:

"The grand jurors . . . present and charge, that B. D. Schleuter, at said county and State, on or about the 27th day of September, 1903, then and there a dramshop keeper, and having a license to keep a dramshop, did keep open such dramshop, and sell and give away, and suffer to be sold and given away, upon and about his premises, intoxicating liquors, to-wit: one glass of whiskey, and one glass of beer, on the first day of the week, commonly called Sunday, contrary to the form of the statute, and against the peace and dignity of the State."

The indictment was attacked by demurrer for duplicity, which was sustained, which ruling the State assigns as error. The particular objection is that defendant is charged in the same count with the offense of keeping his dramshop open on Sunday, and with selling liquor on that day. Bishop, in his work on criminal procedure (section 436), says:

"A statute often makes punishable the doing of one thing, or another, sometimes thus specifying a considerable number of things. Thus, by proper and ordinary construction, a person who in one transaction does all, violates the statute but once and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore, the indictment, on such a statute, may allege in a single count that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunctive "and" where the statute has "or" and it will not be double and it will be established by proof of any one of them."

So it is a rule of criminal pleading that where several different acts named in a statute are the means whereby one offense may be committed and are set out

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in the disjunctive, they may all be charged in one count of an indictment in the conjunctive if they are not repugnant. Thus, in State v. Cameron, 117 Mo. 371, the various modes and artifices mentioned by the statute whereby one is cheated out of his property may be united conjunctively in one count without duplicity. And of the various modes mentioned in the statute as to false pretenses. State v. Fancher, 71 Mo. 460. And so of buying, or receiving, or concealing stolen property. [Stevens v. Commonwealth, 6 Met. 241.] And of selling, or offering to sell, or advertising for sale, lottery tickets. [Commonwealth v. Eaton, 15 Pick. 273.] Cases of such character are cases of one offense which may be committed in a number of ways. They all relate to the same thing and are in no respect repugnant. In such cases there are several modes of committing the cheat; or the false pretense; or disposing of stolen property; or dealing with lottery tickets; any one, or all, the modes being an offense, yet they, not being repugnant, may be charged in the conjunctive. Thus, as stated by Judge BURGESS in State v. Cameron, supra:

"Where a statute in one clause forbids several things or creates several offenses in the alternative, which are not repugnant in their nature or penalty, the clause is treated in pleadings as though it created but one offense; and they may all be united conjunctively in one count, and the count is sustained by proof of one of the offenses charged." Citing, State v. Woodward, 25 Verm. 616; 1 Bishop on Criminal Procedure, sec. 191; Bishop on Criminal Law, secs. 274, 803, 810.

But each of the foregoing cases present offenses of the same class and relate to the same thing. When, however, the acts enumerated disjunctively in the statute are unlike and do not belong to the same class, or embrace the same thing, a more serious question presents itself. If, for instance, the statute in this case had read that, whenever a dramshop keeper kept open his shop, or sold liquors, or played cards, or fought

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chickens or dogs, therein on Sunday, he should be deemed guilty of a misdemeanor and punished by fine and forfeiture of license. In such case an indictment which charged all these acts conjunctively in the same count would join acts, which, considered as separate offenses, are not of the same class, are wholly unlike, distinct and out of relation to each other; and ordinarily such an indictment would be bad. Still, if these unlike acts go to make but one offense such indictment is good.

The statute of Massachusetts provided that one who kept a building resorted to for prostitution, lewdness, or illegal gaming, or used for illegal sale and keeping of intoxicating liquors, should be punished, etc. That was an enumeration of acts, not repugnant, yet distinct and unlike, and yet either, or all of them made but one offense, viz: a nuisance; and all might be charged in one count. [Commonwealth v. Ballou, 124 Mass. 26; Commonwealth v. Kimball, 7 Gray 328.]

In the case before us the offense is the conduct of the dramshop keeper in relation to his saloon on Sunday. The statute prescribes what he shall not do on Sunday, and if he does either of the acts prohibited he commits the offense (State v. Nation, 75 Mo. 53), and if he does *all* the acts he still commits but one offense, in either case subjecting himself to the one punishment. It is true that his acts, though committed on the same day, may be so separated and disconnected in fact, as to make him guilty of separate violations and separate offenses; but in such instances it would be necessary to charge him in separate counts, if the prosecutor desires separate convictions as for separate offenses.

So we are satisfied that the fact that the statute has declared it to be an offense to commit any one of distinct acts, of a distinct and separate class, such as keeping open a dramshop on Sunday, and of selling intoxicating liquors on Sunday, ought not to vary the rule that you may charge them all in one count. For,

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notwithstanding the several acts charged are distinct and unlike, yet they, separately, or all together, constitute the one offense.

But undoubtedly the case of State v. Ambs, 20 Mo. 214, seems at first blush to be contrary to what we have written. In that case the statute of 1835 (which is section 2243, Revised Statutes 1899) prohibited the keeping open any ale house, or the selling of any liquor on Sunday. The indictment contained two counts: one charged the keeping open of the ale house on Sunday and the other the sale of liquors on Sunday. Ambs pleaded guilty and was fined on each count by the circuit court. On appeal to the Supreme Court he contended that he had committed but one offense. The Supreme Court ruled otherwise and said that each act was a separate offense. But it must be borne in mind that the court was really saying that each act was capable of becoming a separate and entire offense, and so we have said in this case. The court ruled that committing either of the acts was an offense, and such acts being separately pleaded and separately confessed, could be separately punished.

And so we have no doubt that though the whole of the acts enumerated in that statute make one offense, yet, as we have already stated, the commission of all of the acts is not necessary to constitute the offense. Either one of them will be sufficient. And when committed separately and counted upon separately, the offender, under the Ambs case, may be punished separately.

It is contended that the indictment is bad in that it omitted the word, "unlawfully," in charging the offense. It will be noticed that the statute which we have set out, does not use that word in stating or describing the offense with which the defendant is charged. in such instances it is not necessary to use the word, "unlawfully," in the indictment. Wharton's Crim. Plead.

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& Prac. sec. 269; State v. Bray, 1 Mo. 180; State v. McWaters, 10 Mo. 168.

The judgment is reversed and cause remanded. All concur.

POWELL HARDWARE COMPANY, Respondent, v. JOSEPH MAYER et al., Appellants.

Kansas City Court of Appeals, November 28, 1904.

1. **CORPORATIONS: Partnership: Evidence.** Though a corporation may not without special charter authority become a member of a partnership, yet, on the facts in this case the plaintiff has done so and there is no legal impediment to such action.

2. ———: ———: **Action.** One partner can not sue another at law, and where he pays more than his proportion he must resort to equity for an accounting.

3. ———: ———: **Guarantor: Money Had and Received.** Where a corporation guarantees the bills of a partnership it can not sue the partnership for money had and received, but must seek its remedy in some other form of action.

4. ———: ———: **Contract: Money Had and Received.** Where the agent of a corporation misappropriates its funds to pay the debt of a partnership of which he is the manager, without the knowledge of this copartners, the partnership can not be made to refund such money, as there is no contractual relation between the corporation and the partnership.

5. ———: ———: **Non-Trading: Partner's Authority.** The manager of a non-trading partnership has no authority to borrow money, and the fact that his copartners may know that he is using more money than has been paid into the firm will not make the partnership liable to a corporation from which the money was taken.

Appeal from Jackson Circuit Court.—*Hon. W. B. Teasdale,* Judge.

REVERSED AND REMANDED.

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Sam B. Strother for appellants.

(1) At best the Powell Hardware Co. were merely guarantors without being requested to be so and under no circumstances could they recover in a case of this kind. (2) From the evidence in this case, it is clear that this was a non-trading copartnership. If this is true that this was a non-trading copartnership, in order that the defendants be bound, then all of the instructions given in behalf of the plaintiff are erroneous and the court should have given a peremptory instruction for defendant. Deardorff v. Thatcher, 78 Mo. 132; Holt v. Simons, 16 Mo. App. 97; Smith v. Sloan, 37 Wis. 285, 19 Am. Rep. 757. (3) The petition does not state a cause of action. The defendants' demurrer to the evidence at close of testimony given by plaintiff, should have been given. Instruction three and four asked by defendant and refused by the court should have been given. Instruction 3 is as follows: "The jury is instructed that if you believe from the evidence that R. J. Powell advanced the money paid out in behalf of defendants, then for whatever amount spent by him should be deducted from the amount sued for in this case." (4) Instruction four, should have been given. Laney v. Fickel, 83 Mo. App. 60; Bambrick v. Simms, 132 Mo. 48; Honeywell v. Canning Co., 53 Mo. App. 245; Lyons v. Murray, 95 Mo. 23. (5) This evidence shows these plaintiffs were partners of the defendants in this enterprise and it is a well-settled principle of law and the universal rule that "A partner can not maintain an action at law against his copartner on a partnership claim or liability." Laney v. Fickel, 83 Mo. App. 63; Bambrick v. Simms, 132 Mo. 48; Rankin v. Fairley, 29 Mo. App. 587.

Geo. N. Longfellow, Paxton & Rose for respondent.

(1) Defendants knew Powell was paying out money for them, and made no objections nor told him

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to stop work on the motor; this made them liable for the money so paid out. Kerr v. Cusenbury, 60 Mo. App. 558; Lindsay v. Moore, 9 Mo. 176; Wood v. Kansas City, 162 Mo. 303. (2) Powell was the agent of defendants, and when he took the money out of the Powell Hardware Co. with their knowledge and for their benefit, they became liable to an action for money had and received, whether there was any contract relation with the Powell Hardware Co. or not, or whether or not they knew whose money it was. 15 Am. & Eng. Ency. of Law (2 Ed.), pp. 1096-1097; Chase v. Mercantile Co., 63 Mo. App. 482; Jacoby v. O'Hearn, 32 Mo. App. 566; Winningham v. Fancher, 52 Mo. App. 458; Deal v. Bank, 79 Mo. App. 262. (3) The resolution that the members of the partnership made among themselves not to go in debt was of no avail if they afterwards departed from it.

ELLISON, J.—Plaintiff was a mercantile corporation engaged in the hardware business and defendants composed a non-trading partnership interested in procuring a patent for a motor car and in constructing a model car to illustrate and show the value, utility and practicability of the proposed patent. R. J. Powell was secretary of the plaintiff corporation and president of the defendant partnership. Plaintiff claimed that Powell drew out money of the plaintiff corporation and used it in the necessary expenses of constructing the motor car and procuring a patent and brought this action for money had and received. On trial in the circuit court plaintiff obtained judgment, whereupon defendants came here for relief.

The evidence in behalf of plaintiff touches upon, or embraces several theories of liability, but it is of a very unsatisfactory and indefinite nature. All we can say of it is that it is unsatisfactory on any theory which it suggests. The principal evidence introduced by plaintiff came from Powell himself. From that it

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is manifest that the plaintiff company was a member of the defendant firm. He states that each of the plaintiff members was a member of the defendant firm though their shares were in his name, and he calls them silent partners. He stated that the plaintiff, as a corporation, was not a member of the defendant firm. This latter statement is, however, a mere conclusion of his, since his entire testimony shows that the company was in fact a member. There is no legal impediment to such membership; for a corporation without special charter authority may not become a member of another partnership, yet, it undoubtedly acted as such in this case. Powell testified that while the business was transacted by him, yet that the members of the plaintiff company were each interested in the defendant partnership and that the expected profits of the latter were to be divided between them. That the money used to pay for the interest in the defendant partnership was the plaintiff company's money, drawn out by him as secretary. He said that he expected to charge it to them individually, but not that it had been done. Indeed, there appears not to have been a single individual act taken, but all acts were those of the plaintiff company through Powell, as its secretary, and with the knowledge of his co-members, one being his wife. Furthermore, there was testimony from one of the defendants (nowhere disputed) that when Powell found that his name, only, appeared in the defendant partnership, he stated that it should have been in the plaintiff's name, but that since it was so put in, he would let it stand. Defendants asked that the jury be directed that if it was believed that the plaintiff was a member of the defendant partnership, the finding should be for defendants. The court improperly refused it. If such was the case, the plaintiff simply paid more than its share of the expenses and this action could not be maintained, since one partner can not sue another in this way. There

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should have been a case in equity for an accounting. Bambrick v. Simms, 132 Mo. 48; Laney v. Fickel, 83 Mo. App. 60; Lyons v. Murray, 95 Mo. 23.

There are further specific portions of the testimony in plaintiff's behalf which go to show that if plaintiff was not acting in partnership with defendants, and if they have an action against defendants, it would be for reimbursement as a guarantor of defendants' indebtedness which it paid in compliance with the guaranty. The witness Powell states that he was defendants' agent and president and that he was plaintiff's secretary in active charge of its business. That in pursuance of authority from defendants to purchase material and procure labor he attempted to do so, but found that he could not do so on the credit of the defendants and that he therefore acting for plaintiffs, with the knowledge of his partners, guaranteed the payment of the bills. If such is the basis of plaintiffs' case it is a variance from the petition.

Again, conceding that we are mistaken in the views expressed in the first paragraph and the plaintiff company was not a member of the defendant firm, but (as plaintiff now contends) Powell and the other persons composing the plaintiff firm, were, as individuals, members of the defendant firm, still plaintiff has shown no cause of action against defendants. If any one has used it's money it was Powell and not the defendants. Powell, whether with or without the consent of his plaintiff copartners, drew the plaintiff's money and applied it to the payment of obligations of himself and his defendant copartners. There is no evidence whatever that the defendant partners knew that Powell was using the plaintiff's money. There is evidence from which, perhaps, it might be inferred that they knew he was advancing money or incurring indebtedness beyond what the defendants had put in, but not that he was using the money of others, either by borrowing, or wrongfully appropriating it. When

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Powell took the plaintiff's money and paid defendants' obligation to creditors, it did not create any more claim in plaintiff's behalf against defendants than if he had himself owed defendants and had taken plaintiff's money and paid them his debt. And yet, in the latter case it has been frequently held that, the party receiving the money, in ignorance of its misappropriation, can not be made to refund it. Smith v. Des Moines Bank, 107 Iowa 620; Stephens v. Board, 79 N. Y. 183; Hatch v. Bank, 147 N. Y. 184; Bohart v. Obern, 36 Kansas 284.

Plaintiff's claim in its brief and argument is, that it was no party to the use of its money for defendants' benefit and, as just stated, there is no evidence that defendants knew its money was being used for their benefit. There was absolutely no contractual relation between them; and realizing that fact, plaintiff founds its action on the theory of money had and received whereby the law would raise a promise to pay. But it must be kept in mind that defendants had no knowledge of plaintiff's money and that all that may be inferred against them is that they knew Powell was using money or incurring indebtedness beyond the sum they had paid in. Powell had no authority to borrow money for them; they were a non-trading partnership with express provision that no partnership debts were to be incurred.

We have not overlooked the suggestion that in consequence of Powell being a member of the defendant firm his act of taking and using plaintiff's money was the act of the defendant firm through him as agent. But that simply recurs back to what we have repeatedly stated, that he had no authority to do so and defendants did not know that he had done so. He simply misappropriated plaintiff's money without his copartner defendants' knowledge and used it in paying joint indebtedness of himself and such copartner defendants. It may be that in a proceeding to adjust the

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accounts between the members of the defendant partnership, Powell would be entitled to credit for money advanced beyond his rightful proportion.

We have hesitated as to whether the judgment should be merely reversed or reversed and remanded, but have concluded that it may be that plaintiff may be able to fall upon some certain and definite legal cause of complaint under the present petition, or under an amendment thereof. But of this we do not pretend to decide.

The judgment is reversed and the cause remanded. All concur.

JOHN C. HAYES, Administrator, etc., Appellant, v. ALBERTUS FRY et al., Respondents.

Kansas City Court of Appeals, November 28, 1904.

1. **FRAUDULENT CONVEYANCES: Administration: Action.** Neither the administrator nor the heirs can maintain an action to set aside a fraudulent conveyance of the intestate; such action can alone be maintained by creditors and those in privity with them. Ellison, J., dissenting in a separate opinion.

Separate Opinion by Ellison, J.

2. ——: ——: ——: **Creditors.** The administrator under our statute is a trustee, first for the creditors, next for the heirs, and if the estate be insolvent, the heirs, having no practical interest, the administrator is merely a trustee for the creditors.

3. ——: ——: ——: **Estoppel.** Where the administrator represents those bound by the act of the testator he is bound; but he is not so bound where he represents those not bound by the testator's acts, as for instance, creditors.

4. ——: ——: **Release: Consideration: Action.** Where a discharge of all claim of work is not a gift but simply a receipt without consideration, the administrator may maintain an action to recover such claim just as the intestate could.

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5. ———: ———: ———: **Fraud.** Where a discharge has been fraudulently obtained from an intestate by coercion or persuasion, his administrator may take advantage of the fraud and have such discharge set aside.

6. ———: ———: **Gifts: Acceptance: Evidence.** To make a gift of a labor account against the debtor there must be a completed act and some evidence in writing delivered to the donee by the donor, as, for instance, a receipt.

Appeal from Bates Circuit Court.—*Hon. W. W. Graves,* Judge.

AFFIRMED.

W. O. Jackson and *Francisco & Clark* for appellant.

(1) The first duty of the administrator is to collect and pay off the claims in the order in which they are classed so far as he has assets. Section 210, R. S. 1899. (2) In Missouri the creditors are bound by the acts of the administrator even where they are not parties to the action. Kennerly et al. v. Shipley, 15 Mo. 640. (3) The administrator can not as a representative of the deceased, nor as the representative of the heirs, participate in setting aside a fraud of the deceased, but as the representative of the creditors, when the estate is insolvent, he not only can, but it is his duty so to do. Hugh v. Menefee, 29 Mo. App. 192; Stewart v. Kennerly, 31 Am. Dec. 482 and notes; Ewing v. Handley, 14 Penn. St. 157n; Andrew v. Hinderman, 71 Wis. 148.

Bruce Barnett for respondents.

(1) The court committed no error in sustaining the motion for new trial. Error has been committed upon the trial in giving instruction numbered 3, for the reason that said instruction submitted to the jury the question as to whether or not the release made to

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the respondents by John Fry, Jr., was without consideration and as such void as in fraud of his creditors, when that is a question, which can be raised only by the creditors of said John Fry, Jr., and not by him nor by his administrator, who stands in his shoes. Brown's Admr. v. Finley, 18 Mo. 378; McLaughlin v. McLaughlin, 16 Mo. 249; George v. Williamson, 26 Mo. 190; Cheely's Admr. v. Wells, 33 Mo. 109; Merry v. Fremon, 44 Mo. 522; Jackman v. Robinson, 64 Mo. 292; Roan v. Winn, 93 Mo. 511; Stevenson v. Edwards, 98 Mo. 626; Thomas v. Thomas, 107 Mo. 464; Crook v. Tull, 111 Mo. 288. (2) And this principle that an administrator can not attack or impeach a gift made by his intestate on the ground that such gift is void as in fraud of creditors, holds good whether the gift be one of personal property or a conveyance of real estate. Brown's Admr. v. Finley, 18 Mo. 375; Thomas v. Thomas, 107 Mo. 464, and other cases supra. (3) The fact of the insolvency of the estate does not authorize the administrator to impeach a gift made by the intestate in fraud of creditors. Brown's Admr. v. Finley, supra. (4) Even after the death of the donor of a fraudulent gift his creditors may have the gift set aside in an equitable proceeding, but the administrator represents the intestate and not the creditors, and can not attack the conveyance as in fraud of creditors. Brown's Admr. v. Finley, supra; George v. Williams, supra.

SMITH, P. J.—This is an action which was brought by plaintiff in his capacity of administrator to recover $1,595 for work done for defendant by the former's intestate during his lifetime. Amongst the defenses pleaded by the answer was that to the effect that the plaintiff's intestate had executed in writing to defendants a full discharge and release for the services performed by the former for the latter. The replication was that said discharge and release pleaded in

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the answer was in the nature of a gift by said intestate to defendant of his property and was without consideration and void as to the creditors of the former; that at the time of the execution of said discharge and release the said intestate was insolvent and largely indebted to various creditors, and especially to one Egger in the sum of $1,300, and that he was without means or property of any kind except said debt that was due to him by defendants.

At the trial the court instructed the jury to the effect, if John Fry, Jr., was working for the defendants, whether under express contract or otherwise, and further finds that at the time, he, the said intestate, executed the written instrument of date August 31, 1901, the said defendants were indebted to said intestate in any sum, and you further find that at such time the said intestate was indebted to John B. Egger and that the instrument of date August 31, 1901, was executed either for the purpose of making a gift of the indebtedness by defendant to said intestate or for the purpose of hindering and delaying the said John B. Egger or other creditors, in the collection of their debts, then such instrument will be insufficient as to this plaintiff as an instrument of conveyance or assignment of debt or account.

The court set aside the verdict, which was for defendant, on the ground that it had erred in its action in the giving of the instruction just referred to, and it was from this order the appeal was taken. The order of the court setting aside the verdict and awarding a new trial was, in our opinion, proper and should be upheld.

In McLaughlin v. McLaughlin, 16 Mo. 242, Judge Scott in writing the opinion of the court said, the "administrator and heirs had no right to impeach any of his (the intestate's) transactions as being fraudulent as against creditors. None but the creditors themselves

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and those in privity with them can avoid an instrument on the ground that it was made to defraud creditors. As a party to a fraudulent conveyance can not allege its illegality with a view to its avoidance, so neither can his heirs and representatives coming in as volunteers and standing as it were in his shoes.'' And from this statement of the law although made by Judge SCOTT more than fifty years ago, there has since been no departure, so far as we have been able to discover, in this State.

It is quite true that in some of the cases there are expressions whose meaning at first blush would seem obscure or possibly ambiguous, but when properly analyzed and understood it will be found that none of them have modified or altered the rule as declared in McLaughlin v. McLaughlin, supra. [Brown's Admr. v. Finley, 18 Mo. l. c. 378; Criddle's Admr. v. Criddle, 21 Mo. 522; George v. Williamson, 26 Mo. 190; Merry v. Fremon, 44 Mo. 518; Jackson v. Robinson, 64 Mo. l. c. 292; Zoll v. Soper, 75 Mo. 460; Roan v. Winn, 93 Mo. l. c. 511; Stevenson v. Edwards, 98 Mo. l. c. 626; Thomas v. Thomas, 107 Mo. l. c. 459; Crook v. Tull, 111 Mo. l. c. 288; Heinrichs v. Woods, 7 Mo. App. 236; Rozelle v. Harmon, 29 Mo. App. 569.] According to the rulings in the adjudications just referred to, it is plain that it would not have been permitted to the intestate had he sued on the cause of action in issue in this case during his lifetime to question the validity and binding effect of the release and discharge pleaded by the answer on the ground that it was made and contrived in fraud of his creditors and therefore void, nor to the plaintiff, his representative standing in his shoes.

The rule enunciated by the said instruction is inapplicable in a case of this kind. Accordingly, the order granting the new trial must be affirmed. All concur.

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SEPARATE OPINION.

ELLISON, J.—1. In my opinion the present state of the law in this State does not justify us in holding to the old rule stated in Brown v. Finley, 18 Mo. 375; George v. Williamson, 26 Mo. 190, and some other cases, that an administrator of an insolvent estate could not avoid the voluntary and fraudulent transfer of property by his intestate.

The administrator under our statute is a trustee for creditors of the estate. This is manifest from the fact that his duty is to protect, collect and preserve the estate in the interest of and for the benefit of the creditors *first,* and next the heirs, and if the estate be insolvent, the heirs would have no practical interest in it and the administrator would be merely a trustee for the creditors. He is so declared by the Supreme Court. In Stagg v. Green, 47 Mo. 500, it is said: "The policy of our law is obvious. The executor is but a trustee; he receives nothing in his own right, but everything for the use of others." This is restated in Chandler v. Stevenson, 68 Mo. 450. "The prevailing rule now established in this court is, that executors and administrators stand in the position of trustees to those interested in the estates upon which they administer." [Merritt v. Merritt, 62 Mo. 150.] This view of the relation of an administrator is repeated by the Supreme Court in a late opinion by Judge BURGESS wherein it is stated that he is "a trustee for the creditors and for heirs or legatees." [Richardson v. Cole, 160 Mo. 372.] Under the old regime, where the probate and administrative system was not so comprehensive and exclusive as now, it was held by many courts that the administrator could not attack his intestate's fraudulent deed or act; but that a creditor had a remedy for himself, by charging the fraudulent grantee as an executor *de son tort*: that is, that such grantee held property which was properly assets of the estate for liquidation of debts. But the

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growth of our statute and the comprehensiveness of the probate system has silently eliminated such thing as an executor *de son tort* and the rights of suitors which formerly obtained against such a personage no longer exists. [Rozelle v. Harmon, 103 Mo. 339.] The former rule which denied the right of the administrator of an insolvent intestate to attack the grantor's transfer, and allowed it to a creditor, was one of great inconvenience and might require as many suits as there were creditors. It likewise, in practice, resulted in great injustice; for the first creditor to attack could monopolize the whole property if necessary to pay his claim. It was so stated and conceded in George v. Williamson, supra. But in Rozelle v. Harmon, the court, after saying that the provisions of our present statute "are wholly inconsistent with the idea of executors *de son tort* as at common law," expressly state that the statute does not recognize "the right of one creditor to secure payment of his debt to the exclusion of others." In speaking of the scheme and object of the probate law, the Supreme Court of New York said: "It impounds his (the deceased's) estate for the benefit of his creditors, and no creditor can, by any procedure or any degree of vigilance, obtain any preference over others." [Lichtenberg v. Herdfelder, 103 N. Y. 306.] The case of Rozelle v. Harmon is in keeping and harmony with the prior ruling in Titterington, Admr. v. Hooker, 58 Mo. 593, where a creditor of an estate without personal assets and which had been settled up, undertook to redress himself by suing the heirs and charging their land as assets received from the estate. But the court held that that could not be done, as it formerly might, since our statute was "designed to entirely supersede the more cumbrous machinery of the common law, and that the whole doctrine of equitable assets, marshalling assets in equity for the payment of debts, and bills for the discovery of assets and account, is without application." And so it is distinctly

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held in other jurisdictions that, where the system of administering estates (whether by express statute, or implied from the general exclusive comprehensiveness of the statute) does away with executors *de son tort*, and consequently interferes with the creditors' separate remedy direct against the fraudulent grantee, the administrator, if the estate be insolvent, is a trustee for the creditor and he may attack the conveyance. [Babcock v. Booth, 2 Hill 181; Kilbourne v. Fay, 29 Ohio St. 264; Hunt v. Butteworth, 21 Texas 133.] In other States the right is upheld in the administrator without reference to the creditor's right to pursue an executor *de son tort*. Thus, it is distinctly stated in Massachusetts that the administrator acts in a dual capacity—he represents deceased, but he is likewise a trustee for the creditors. [Holland v. Craft, 20 Pick. 321, 327, 331; Martin v. Root, 17 Mas. 222, 227; Chase v. Redding, 13 Gray 421; Welsh v. Welsh, 105 Mass. 229; Gilsm v. Hutchison, 120 Mass. 27; Parker v. Flagg, 127 Mass. 28.] And it is held in those cases that he may attack the fraudulent transfer of personalty by his intestate. In that State there is a statute authorizing the administrator to attack a deed to real estate, but the holding is made as to personalty without the aid of a statute. So, in New Hampshire, the administrator is trustee for creditors and for them may make the attack. [Abbott v. Tenny, 18 N. H. 109; Cross v. Brown, 51 N. H. 486.] And the same is held in Maine. [McLean v. Weeks, 61 Maine 277; Frost v. Libby, 79 Maine 56.] The same view is taken in Iowa where the statute appears to be of the same general scope as ours. [Cooley v. Brown, 30 Iowa 470.] The same view is taken in Connecticut. [Basset v. McKenna, 52 Conn. 437.] And the same is held in Louisiana. [Judson v. Connelly, 4 La. Ann. 169 and 5 La. Ann. 400; Sullice v. Gradenigo, 15 La. Ann. 582.] And the same in Pennsylvania. [Buehler v. Gloninger, 2 Watts 226; Bouslough v. Bouslough, 68 Pa. St. 495.] In the latter

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case it is said that, a grantor "can not avoid his own conveyance or gift even though fraudulent as to creditors. The same rule follows the estate into the hands of his executor or administrator, who can not set aside the fraudulent act for the benefit of his heirs or next of kin. But when the interest in the subject changes, a different rule prevails. Therefore, the executor or administrator may set up the fraud, and avoid the act of the decedent for the benefit of creditors where the estate is insolvent." The same is held in many other States, but as in those there was a statute specially authorizing the administrator to recover the property, we have not referred to them. But the cases which we have cited are put upon the broad ground, either that the creditor has no other remedy than through the administrator, or that he, being a trustee for creditors, has, necessarily, the right to sue for the fraudulently transferred property. The cases we have thus cited fit the condition of the law as we have shown it to be in this State. Schouler's Executors, 220, 297, so states the law.

It is manifest that the authorities to the contrary leave out of view the *dual* capacity of the administrator. He is the deceased's representative, it is true, but he is now, under our statute and all others of like import, also the representative of the creditors. Indeed, his primary duty is to the creditors. When the administrator comes to represent the heirs who claim through the deceased, he is bound by the act of the deceased. But he has also a duty charged upon him in behalf of the creditors. The statute contemplates that he shall collect in the assets of the estate which must *first* be paid out to creditors *before the heirs have any interest therein.* As to creditors, property fraudulently transferred is an asset of the estate. And when he represents them he is not representing an interest which comes through the deceased, but rather one that is in antagonism. In performing that duty he is a

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trustee and can not, with any show of reason or logic, be met with the statement that he only represents the deceased and that he stands in his shoes.

In St. Francis Mill Co. v. Sugg, 169 Mo. 130, 136, the Supreme Court, through Judge VALLIANT, without approval or disapproval, refers to the cases which announce that an administrator can not avoid his intestate's fraudulent transfer. But he adds that the administrator should treat property as assets of the estate when its fraudulent transfer has been set aside at the suit of creditors. That statement of the law overrules what was said in George v. Williamson, 26 Mo. 190, wherein it was held that the creditor who sets aside the fraudulent transfer of his deceased debtor would have the benefit of the whole property to the exclusion of other creditors, if necessary to the payment of his claim. For if it becomes assets to be administered upon by the administrator, it would, of course, be for the benefit of all. Now, if the administrator is entitled to take the property recovered at the suit of the creditor, there can be no reason why he should not be permitted to recover it himself. He is a trustee for the creditor and he must administer on the recovered property, and so it approaches the absurd to say, in this state of the law, that he can not himself maintain the suit. It is not necessary to deny the right of the creditor also to maintain suit. There might be instances of non-action by the administrator where it would be necessary for him to do so.

My conclusion is this: that the administrator is bound by any act of the deceased where he represents those who themselves would be bound by such act, as, for instance, heirs. But he is not bound where he represents those who are, themselves, not bound by such act, as, for instance, creditors.

2. As the case is to be retried it is well enough to express our views on a question which the record shows may possibly arise. The pleadings show that it was a

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part of plaintiff's case that the release of deceased's claim for the work he performed for defendant and for which this suit was brought, was without any consideration to support it; and the record states there was evidence tending to sustain the allegations in the pleadings of the respective parties. If it is true that the release or receipt in discharge of all claim for work was not a gift, but simply a receipt or discharge without consideration, then there is no reason, under any view, why plaintiff as administrator should not be allowed that defense. For it is such a defense that the intestate himself could have made were he alive. And, of course, if he could have interposed such defense, his representative may.

3. And so it appears to be a part of plaintiff's case that the receipt and discharge was fraudulently obtained *from* the deceased. And that deceased was sick and in such mental state as not to be capable of transacting business; and while in such condition, defendants, partly by coercion and partly by persuasion (which, in his mental and bodily condition, he could not resist), obtained the paper from him. If either of these contentions are true there can be no objection to an administrator taking advantage of it for the benefit of the estate. Croswell's Executors, 234-236. For they, too, are such matters as the deceased himself could set up. Whatever may be said as to the inability of an administrator to set up the fraud of his intestate to avoid his transfer of property or property rights, there can be no reason why the administrator may not set up the fraud of the grantee whereby the intestate was the victim.

4. If the intestate was of the capacity to make a gift of his labor account against defendant, and intended to do so, there must have been a completed act. There must have been a delivery of the thing given, accepted by the donee. In case of an incorporeal thing like a claim for work and labor there must be some evi-

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dence of the gift in writing delivered to the donee by the donor, such as, for instance, a receipt. [Thornton on Gifts, 131, 262; Spooner v. Hilbish, 92 Va. 333.]

The other judges concur in this opinion except as to the first division; as to that, they regard the rulings of the Supreme Court referred to in the majority opinion as binding.

KIMBER L. BARTON et al., Respondents, v. KANSAS CITY et al., Appellants.

Kansas City Court of Appeals, May 30, and December 19, 1904.

1. **TAXBILLS: Kansas City Charter: Sewers.** The charter of Kansas City authorizes a construction of district sewers when the city council shall deem them necessary for sanitary or other purposes. On the evidence a sewer mentioned in the opinion was not a sewer for either sanitary or drainage purposes as required by the ordinance, and the taxbills issued to pay for its construction were void.

2. ———: ———: ———: **Subsequent Connections.** The fact that after the construction of the sewer the park board may have connected catch basins along the street gutter with the sewer, can have no curative effect on the prior work.

3. ———: ———: ———: ———. Nor can the fact that such connections were made by the park board before the taxbills were issued avail to give them any validity whatever, as the contractor must lose for the invalidity which attached to the work as it stood completed and disconnected from any subsequent consideration.

4. ———: ———: ———: ———. The City of St. Joseph v. Owens, 110 Mo. 445, is distinguished, and attention called to the fact that the charter of St. Joseph requires that sewers "shall be of such dimensions as may be prescribed by ordinance," while the Kansas City charter provides that the sewer "shall be of such dimensions, material and character as shall be prescribed by ordinance."

Appeal from Jackson Circuit Court.—*Hon. J. H. Slover,* Judge.

AFFIRMED.

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Clarence S. Palmer and *R. J. Ingraham* for appellants.

(1) The recital in the ordinance that the common council deemed the sewer necessary for sanitary and drainage purposes did not render the ordinance invalid. (2) There could be no question that a sewer which carries the street drainage off from the street and deposits it in a running stream and which furnishes the means of draining stagnant pools of water, is a benefit to the public health. Courts take judicial notice of such facts. Land & Stock Co. v. Miller, 170 Mo. 240, 77 S. W. 721. (3) The charter, section 10, article 9, provides that district sewers shall be built "whenever the common council may deem such sewers necessary for sanitary or other purposes." The council found this sewer necessary for sanitary and drainage purposes. There is no allegation of fraud. The testimony of plaintiffs themselves show that the sewer serves the purpose both of drainage and sanitation. The sewer was built exactly as provided by ordinance. (4) The charter places the responsibility upon the common council of determining the method of constructing the sewers, and unless the ordinance passed by that body was absolutely unreasonable, it will be sustained by the court. Heman v. Schulte, 166 Mo. 409. (5) This sewer not only need not have been built as a public sewer, but could not have been so built under the Kansas City charter. (6) As to whether a sewer is a district sewer or public sewer, our Supreme Court has sustained the judgment of the common council to a very great degree. Heman v. Allen, 156 Mo. 534; Land Co. v. Kansas City, 172 Mo. 523. (7) Whether the sewer lying in a single sewer district should be built as a district sewer or a joint district sewer was a question for the council. Prior v. Construction Co., 170 Mo. 450, 71 S. W. 2. (8) The fact that this sewer would not drain the whole district is no reason for holding

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the taxbills to be invalid. (9) The mere fact that most of the property of plaintiffs could not drain into this particular sewer is no reason why the taxbills are invalid. This objection is not pleaded and even if it had been pleaded would not have availed. Johnson v. Duer, 115 Mo. 336; Heman v. Schulte, 116 Mo. 409; Prior v. Buehler, 170 Mo. 451. (10) The fact that plaintiffs were not required to pay for catch-basins does not invalidate the taxbills. St. Joseph v. Wilshire, 47 Mo. App. 125; St. Joseph v. Owen, 110 Mo. 455. (11) It was not necessary at this time to provide catch-basins in the ungraded condition of Harrison street. (12) The necessity for the construction of this particular sewer was for the council to determine and its action is conclusive. Miller v. Anheuser, 2 Mo. App. 168; Young v. City, 47 Mo. 493. The question of the necessity of the sewer for sanitary or other purposes rests wholly with the council, and is not under the supervision or control of the courts.'' McCormack v. Patchin, 53 Mo. 35. (13) The public interests require that sewer taxbills should be upheld unless some imperative objection exists.

Peak & Strother and *Gage, Ladd & Small* for respondents.

(1) The sewer for which the taxbills in suit were issued is not a district sewer within the meaning of the city charter, because it has not the necessary inlets or appurtenances for house drainage. K. C. Charter, art. 9, sec. 10; Bayha v. Taylor, 36 Mo. App. 438. (2) That a storm sewer, or a sewer which does not receive sewage proper, but simply receives surface water, such as the one in question, was never intended to be authorized by the charter of Kansas City as a district sewer, is also obvious. (3) The charter certainly means that the sewer for which the people in the district are to pay when it is completed, shall be susceptible of

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being used for some purpose when it is completed, for the taxbills are to be issued then (see art. 9, sec. 10), and then, if ever, become a lien and charge on the property. (4) Furthermore, the ordinance declared it was necessary to build the sewer for "sanitary and drainage purposes;" but no provision was made for inlets for either purpose, and it can never be used for sanitary purposes, because its outlet is in a parkway and of course could receive no offensive or impure matter. The pretense that it performs a sanitary purpose as well as a drainage purpose is obviously untrue. It can not be a sanitary sewer; has no inlets for that purpose and no outlet for that purpose. (5) While the new charter does not expressly provide how district sewers shall connect, the provisions contained in the old charter contemplating that they shall be part of a sewer system, are unchanged, and we submit that they must still have such an outlet to answer the purpose of all sewer systems, as stated in the Bayha case, namely, "to collect in the sewers the sewage of the city, and to conduct it through the sewers out of the city to some safe receptacle and thus finally dispose of it." Here, the outlet was in a branch in a parkway in the sewer district, where sewage would not be allowed to be deposited.

H. L. McCune for respondent, Frank J. McGlinchey.

(1) The powers vested in the city council must be exercised within the bounds of reason and apparent necessity. They must not impose a burden without a benefit, and the unreasonableness of their exercise is a fit subject for judicial inquiry. Corrigan v. Gage, 68 Mo. 541; Skinker v. Heaman, 148 Mo. 356; Albright v. Fisher, 164 Mo. 56. (2) The validity of the taxbills must be determined by the reasonableness of the ordinance as passed, and not by what may be done in the future to make the sewer useful. Bayha v. Taylor, 36

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Mo. App. 444. (3) The ordinance provided for a sewer, which the city deemed necessary for sanitary and drainage purposes. This sewer has been constructed for drainage purposes only and is not constructed for the purposes for which it was declared by the common council to be necessary and the taxbills are therefore void.

ELLISON, J.—This is a proceeding by bill in equity whereby plaintiffs seek to have declared void and cancelled, certain taxbills which are apparent liens on their property and are a cloud on their title. The trial court entered a decree for the plaintiffs.

The city council of Kansas City, Missouri, by ordinance, established and ordered constructed, a district sewer in sewer district No. 11, sewer division No. 5. The ordinance duly describes the proposed sewer as beginning at the intersection of Troost avenue and Armour boulevard, at a point on the center line of said avenue and twenty feet north of the south line of said boulevard. Its course is then described on other streets over a total distance (not including one lateral) of near one-half mile, terminating in "an outlet in a creek running north and south between" two streets. For a part of the distance its diameter was to be three feet and two inches, and for the remaining distance it was to be four feet. The sewer was ordered for sanitary and drainage purposes; the words of that portion of the ordinance being:

"Said sewers shall have all necessary manholes, with their necessary connections, and shall be paid for in special taxbills against and upon the lands in said sewer district, as provided by law, which work the common council . . . deems necessary to have done for sanitary and drainage purposes."

Neither the ordinance nor the contract for construction provided for any entrance or ingress into the sewer except the ordinance provides for "manholes"

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which were modes of ingress from the top of the sewer in the middle of the street. The words of the ordinance are: "Manholes for the inspection, cleaning and ventilation of said sewers, shall be constructed as parts of, or appurtenances to said sewer at the following points." The ordinance then proceeds to provide that there shall be five manholes on the main sewer and two on the lateral, at designated points.

There was no provision made in the ordinance for connecting the sewer with houses so as to receive the sewage. ordinarily originating in buildings and it is conceded that it was not intended for that purpose. Nor was there any provision for connecting the sewer with inlets and catch basins on the curb line of the streets, so that it might receive surface water and thereby perform the function of drainage. The ordinance provided for "necessary connections with manholes," but the contract did not, and none were constructed.

The contractor completed the sewer within the time required. When it was finished and be became entitled to the taxbills (if the proceedings were valid) the sewer had no connection with anything at its beginning and, as stated, its end was in a creek, or ravine. Vital importance is however attached by defendants to the following considerations. It appears that prior to the ordaining of the ordinance for the sewer, the city council had authorized, by ordinance, the board of public park commissioners to construct guttering and curbing along the sides of Armour boulevard of cement and artificial stone, which work, the ordinance provided, should be paid for by the issuance of taxbills against the lands of property-owners. The park board then proceeded to do the curbing and guttering, marking and designating at certain points on such curb, places for the entrance and sinking of catch-basins. It appears further, that after the sewer was completed the park board, of its own motion (that is without an ordinance

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of the city council) had catch-basins constructed and connection run from them out into the street and there connected with the sewer. These basins and connections were paid for out of the general park board funds, and, as just stated, without their construction having been ordered by the city council.

Several points have been urged against the validity of the taxbills, under the foregoing facts. It will not be necessary to notice all of them.

The charter of Kansas City (section 10 of article 9) authorizes the construction of district sewers whenever the city council shall deem them "necessary for sanitary or other purposes." The two well known purposes for which sewers are constructed, are sanitation and drainage. While we will not say that it is in all cases true, yet, generally, the only sewer, other than a sanitary sewer, is a sewer for drainage of surface water. So we conclude that this provision by the charter authorizes the construction of a district sewer for sanitation alone, or drainage alone; or, as is most commonly found in Kansas City, a combined sewer for both sanitation and drainage. While a sanitary sewer, or, to use the language of the charter, a sewer for sanitary purposes, will also, in one sense, be a drainage sewer, since it drains off the sewage from inhabited places; yet its function, as was explained in the evidence in this case, and as is the evident meaning of the charter, is one which is adapted to the purpose of carrying off sewage proper, that is, foul matter or such as may become foul, which originates in inhabited places. And so a sewer for drainage purposes, while it will carry off surface water which, if gathered in pools, would become stagnant and unhealthful, may in that respect answer a purpose of sanitation, yet its general purpose is drainage of surface water practically uncontaminated; and so it was shown in evidence. In the present instance, the ordinance directed the construction of a sewer "for sanitary and drainage purposes." That is,

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a combined sewer, to answer both purposes. It was for the construction of such a sewer that taxbills were authorized against the property of owners, among whom are these plaintiffs, and for which their property was to be taken and sold without their consent, unless they came forward and discharged the bills by payment.

The sewer here involved, as it has been constructed, is not the sanitary sewer known to the charter and the sewer system of Kansas City, nor is it the combined sewer for sanitary and drainage purposes, known to that system. If anything, it was a drainage sewer only; and, indeed, it is undisputed, that it was not intended for house connection or use. As constructed it was, therefore, not the sewer authorized by the ordinance and there is no base upon which the taxbills can stand, and we adopt the conclusion of the trial court that they are void.

The decree entered must be affirmed for the further reason that the construction called a sewer was, in fact, not a sewer for any purpose. It was, as stated by counsel in argument, "a blind dry tunnel" dug under the surface of the street with no outside connection whatever, whether considered as a sanitary, drainage, or combined sewer. And though the ordinance provided for "all necessary manholes with their necessary connections," there were, as already stated, no catch-basins, nor connections between where such basins should have been and the sewer provided for in the contract; and none were constructed by the contractor. The sewer could not be used for any purpose. But (in the manner above set out) the park board, some time after the sewer was completed and the contractor's work was at an end, did construct catch-basins and connections from them to the sewer, so that surface water on the streets will be taken up and run into the sewer. We can not see how such fact can affect a taxbill, the validity or invalidity of which must nec-

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essarily have been fixed and determined by the validity or invalidity of the work for which they were to be the payment. It is conceded by counsel that the completed sewer, being without catch-basins or connections, did not furnish ground for a valid taxbill. Suppose then, that the park board had not built these connections and thus made the sewer of practical use. That board was not obliged to build the connections, nor is that body charged by the charter with power or authority to construct sewers. The charter provides that district sewers are to be provided for and built under the authority of the city council, a power which it has been again and again decided the council can not delegate to any other body. It is to be paid for in special taxbills against private property. These must find their valid foundation in the action of the city council and not that of some other body. How, then, can the mere subsequent action of the park board, which may never have been taken, vitalize an invalid work? Manifestly it can not. In Bayha v. Taylor, 36 Mo. App. 427, 444, the proper body, the city council, undertook by subsequent action to do that which it was thought would have legalized the work, if it had been done prior to the work. But this court held that it would be reversing the order of things and could not be done. Again, in St. Louis v. Clemens, 52 Mo. 134, the Legislature itself, undertook by subsequent action, to vitalize invalid public work, and the Supreme Court held that the act was retrospective and that it could not be done so as to charge property-owners with its cost. So, therefore, we regard the act of the park board as a mere coincidence, and as having no curative effect on the prior illegal work.

It appears that while the acts of the park board referred to were taken after the construction of the sewer, yet such acts were before the taxbills were issued. That, of course, is of no consequence. When the contractor finished the work, and the only work pro-

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vided for by the ordinance and contract, he was, or was not, entitled to the taxbills. His right was then made up, not to be added to or subtracted from, by subsequent matters over which he had no control and in which he had no part. As before suggested, suppose the park board had not taken the action it did; would the contractor have lost his labor, not from inherent invalidity in the proceedings leading up to and running through the work, but from an omission of a distinct and independent body? Certainly not. He loses from the invalidity which has attached to the work as it stood completed and disconnected from after considerations entered upon by a distinct body with which he had no connection.

Counsel for defendant have cited the case of St. Joseph ex rel. v. Owen, 110 Mo. 445. We think that the case itself, and the foundation upon which the decision rests have no application to this controversy. Since that authority is so frequently cited in cases arising under the Kansas City charter, we are justified in calling attention to the important fact, that that case arose under the charter of the city of St. Joseph, wherein there is no provision that the material of which the sewer is to be constructed and its character shall be prescribed by ordinance. That charter only requires that the sewer "shall be of such *dimensions* as may be prescribed by ordinance." While the charter of Kansas City provides that the sewer "shall be of such dimensions, *material and character* as shall be prescribed by ordinance." And notwithstanding the St. Joseph charter did not require the material to be provided for in the ordinance, yet we held (before the St. Joseph case was decided by the Supreme Court) St. Joseph v. Wilshire, 47 Mo. App. 125, that the material of which a sewer was to be constructed involved legislative discretion and that its designation and selection could not be delegated.

The judgment is affirmed. All concur.

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ALABAMA STEEL & WIRE COMPANY, Respondent, v. ARTHUR E. SYMONS et al., Appellants.

Kansas City Court of Appeals, June 20 and December 19, 1904.

1. **SALES: Implied Warranty: Acceptance: Instruction: Sample.** Defendants ordered 5,000 kegs of nails from the plaintiff, saying "they were to be used in the manufacture of boxes and to be driven by machinery and must have broad heads and be of uniform length," and enclosed samples. On receipt of a shipment defendants asked an extentsion of sixty days to pay for those received and countermanded the order for the balance, returning forty kegs to plaintiff, the remainder, after examination were disposed of to defendants' customers. The jury were instructed that if defendants accepted the nails knowing they were inferior in quality, they could not object to such quality. *Held*, by **Broaddus, J.**, that the instruction was right as there was no implied warranty. **Ellison, J.**, in a separate opinion, **Smith, P. J.**, concurring, holds that there was an implied warranty that the nails should conform to the sample, and the instruction should not have been given.

2. ———: ———: **Pleading: Answer.** On pleading set out in the opinion **Broaddus, J.**, holds plaintiff entitled to judgment on the pleadings as the answer fails to allege an expressed or implied warranty of fraud. **Ellison, J.**, in a separate opinion, **Smith, P. J.**, concurring, holds that at the trial the parties proceeded upon the theory of a warranty and an alleged breach thereof and the court must do as the parties have done and overlook any question as to the pleading.

3. ———: ———: **Acceptance: Diminution of Purchase Price.** Where there is a warranty expressed or implied the vendee upon a breach thereof may return the goods, or accept the same and set up a breach of warranty in diminution of the purchase price.

On Motion For Rehearing.

4. ———: **Samples: Intention: Appellate Practice: Trial Theory.** Sales by sample are matters of intention and where samples of nails desired are exhibited to a manufacture and accepted by the latter as a sample of the nails agreed to be manufactured, and at the trial the evidence and instruction is upon the theory that the sale was by samples, the appellate court treats the case as made by the parties.

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5. ——— : ——— : **Manufacturer: Specific Purpose: Warranty: Instruction.** Whether the sale be by sample or by manufacture or for a specific purpose, the instruction set out in the former opinion is improper, as in each mode of sale there is an implied warranty and the buyer does not waive his right to contest the contract price by accepting the goods.

Appeal from Jackson Circuit Court.—*Hon. W. B. Teasdale,* Judge.

REVERSED AND REMANDED.

Karnes, New & Krauthoff for appellants.

(1) The first instruction given by the circuit court on behalf of the plaintiff reduced to its last analysis, told the jury: (a) If defendants accepted the nails; (b) If defendants knew they were inferior in quality or not the quality of nails contracted for and ordered by defendants; (c) Then defendants can not now object to the quality, and (d) Your verdict must be in favor of plaintiff for the amount sued for. New Birdsall Co. v. Keys, 99 Mo. App. 463, and cases cited; Brown v. Wellon, 27 Mo. App. 251, 99 Mo. 564; Werner v. O'Brien, 40 Mo. App. 489; Miles v. Withers, 76 Mo. App. 87; Assn. v. McEnroe, 80 Mo. App. 429; Schoenberg v. Loker, 88 Mo. App. 387; June v. Falkinburg, 89 Mo. App. 571. (2) The first instruction given on behalf of plaintiff is also open to the objection that it submits to the jury a question of law; that is to say the jury are told that if "the defendants accepted the nails" certain results would follow. It is respectfully submitted what is an acceptance is a question of law. (3) The second instruction given on behalf of the plaintiff is erroneous in that it submits to the jury an issue not made by the pleadings and not disclosed in the evidence. (4) The jury are told in the third instruction given for the plaintiff that "defendants can not off-set or have allowed to them any damage or loss by reason of such defective nails, if any, which damage

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or loss was not fairly in the contemplation of both parties at the time the contract for said nails was made." This instruction is also erroneous because submitting a question not raised by the pleading and not disclosed in the evidence.

Lathrop, Morrow, Fox & Moore for respondent.

(1) Instruction numbered one complained of by appellants is sound in principle and supported by the authorities. 24 Am. and Eng. Ency. of Law (2 Ed.), 1092; Stevens v. McKay, 40 Mo. 224; Crawford v. Elliott, 78 Mo. 497; Lumber Co. v. Warner, 93 Mo. 374; Water, etc., Co. v. Lamar, 140 Mo. 145; Assn. v. Gorman, 76 Mo. App. 184; Ashford v. Schoop, 81 Mo. App. 539; Cook v. Finch, 117 Ga. 541, 44 S. E. 95; Lee v. Bangs, 43 Minn. 23, 44 N. W. 671; Rosenfield v. Swenson, 45 Minn. 190, 47 N. W. 718; Thompson v. Libby, 35 Minn. 443, 29 N. W. 150; McClure v. Jefferson, 85 Wis. 208, 54 N. W. 777; Jones v. McEwan, 91 Ky. 373, 16 S. W. 81, 12 L. R. A. 399; Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831; Williams v. Robb, 104 Mich. 242, 62 N. W. 352. (2) The instruction complained of is not open to attack under any theory, in view of the pleadings in this case. 24 Am. and Eng. Ency. of Law (2 Ed.), 1126; 19 Ency. Pl. and Pr., 44; 2 Mechem, Sales, secs. 1311, 1320, 1350, 1391; Blashfield, Instructions to Juries, sec. 84; Graff v. Foster, 67 Mo. 512; Wade v. Scott, 7 Mo. 509; Gordon v. Bruner, 49 Mo. 570; Northrup v. Ins. Co., 47 Mo. 443; Bank v. Armstrong, 62 Mo. 59; Christian v. Ins. Co., 143 Mo. 460; Garvey v. Hauck, 85 Mo. 14; Calhoun v. Paule, 26 Mo. App. 274; Long Bros. v. Armsby Co., 43 Mo. App. 253; Fenwick v. Bowling, 50 Mo. App. 516; Smith v. Rembaugh, 21 Mo. App. 390; Shepherd v. Padgitt, 91 Mo. App. 473; Brown v. Weldon, 27 Mo. App. 251; Stevens v. Supply Co., 67 Mo. App. 587; Bank v. Westlake, 21 Mo. App. 565; Matson

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v. Frazer, 48 Mo. App. 302; Wright v. Fonda, 44 Mo. App. 634; Kirby v. Railroad, 85 Mo. App. 345; Fegan v. Seed, etc., 92 Mo. App. 236; Smith v. Coe, 170 N. Y. 162, 63 N. E. 57; Weil v. Unique, etc., Co., 80 N. Y. Supp. 484; Knable v. Stove Co., 19 Misc. (N. Y.) 152; Paving Co. v. Gorman, 103 Mich. 403, 61 N. W. 665, 27 L. R. A. 96; Parks v. O'Connor, 70 Tex. 377, 8 S. W. 104; Day v. Mapes-Reeves Co., 174 Mass. 412, 54 N. E. 878; Obery v. Lander, 179 Mass. 125, 60 N. E. 378; Maynard v. Render, 95 Ga. 652, 23 S. E. 194; Misner v. Granger, 4 Gil. (Ill.) 69; Shirk v. Mitchell, 137 Ind. 185, 36 N. E. 850; Case v. Grim, 77 Ind. 565; Blumenthal v. Grember, 130 Cal. 384, 62 Pac. Rep. 599; Schopp v. Taft, 106 Iowa 612, 76 N. W. 843. (3) The other points raised by appellants are frivolous. Webster's Dictionary; The Century Dictionary; Standard Dictionary; Stevens v. McKay, 40 Mo. 224; Greenleaf v. Hamilton, 94 Me. 118, 46 Atl. Rep. 798; Ellis v. Tips, 16 Tex. Civ. App. 82, 40 S. W. 524.

BROADDUS, J.— The petition alleges that, "plaintiff sold, furnished and delivered to defendants at defendants' instance and request, goods, wares and merchandise during the year 1901 to the aggregate amount and of the aggregate value of $2,321,99; that said defendants are entitled to credits thereon to the aggregate amount of $1,714.70 . . . that said goods, wares and merchandise were of the kinds, quantities and qualities as shown by itemized statement of account, and were sold and delivered upon the dates as therein given, and that the prices therefor, as shown by said itemized statement of account, are reasonable and proper prices of and for said goods, wares and merchandise, and the prices agreed upon by and between plaintiff and defendant, and that the balance unpaid on said account is $607.29."

The answer admits the sale and delivery of the nails, but avers that the nails so sold and delivered

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were defective in that the heads of the same were not sufficiently broad, the points were poor and they were not uniform in length; and that a large number of them were bent, and varied in length, some of them being an inch shorter than other nails in the same keg. The answer further avers that the nails delivered were not of the value paid for them and that defendants owe plaintiff nothing. The answer however alleges that defendants paid plaintiff $4,815.11 for nails delivered.

The reply, after denying the new matter set up in the answer, states: "In the month of May, 1902, plaintiff sold and delivered to defendants $1,588.28 worth of nails, which defendants paid, less a discount of $35.20; and during said month also sold and delivered to defendants $1,512.13 worth of nails which they paid, less a discount of $33.61; but that the sale of the last named nails was made prior to the sale of nails for the balance of the purchase price for which the suit is brought."

On May 4, 1901, the defendants made an order on plaintiff for 5,000 kegs of wire nails (the nails in controversy), 3,000 kegs of which were to be shipped to Chicago, and 2,000 kegs to Kansas City, Missouri. On the same day, the defendants addressed to plaintiff a letter in reference to said nails which, among other things, contained the following: "As our nails are for use in the manufacture of boxes and are all driven by machinery, it is necessary that they have extra broad heads and be as near uniform in length as possible. We enclose a few samples." Plaintiff accepted the order and made and shipped four car loads of nails. Defendants asked and obtained an extension for sixty days' time to pay for a part of the nails which had been delivered, and the balance of the order was countermanded. Forty kegs of the nails were returned to plaintiff. Except those returned, all the nails shipped, after being examined by defendants, were received and disposed of by them to their customers.

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The evidence of the plaintiff tends to show that the nails in question were made to conform substantially in compliance with the specifications. One of the witnesses examined four kegs of those returned. He stated that there were about 30,000 nails to the keg; and that he emptied them from the kegs and upon careful examination, after going over 130,000 nails, he found only 193 that were defective and 175 of a different size. Defendants' evidence was to the effect that the nails were defective. Some of them shorter than others; some without points; some bent; and others with small heads. The estimate of one of defendants' witnesses was that one-third of the nails the defendant received were defective. It is admitted that defendants received and used the nails knowing that they were defective. After some of the nails had been shipped, defendants complained to plaintiff that they were defective in the particulars mentioned, but did not offer to return them, other than the forty kegs reshipped to plaintiff, as stated, and for which credit was given. The finding and judgment were for the plaintiff and defendants appealed.

The only issue made by the pleadings was the value of the nails received by defendants, as the contract price alleged in the petition was not denied. On the issue thus presented the respective parties introduced their evidence. The principal error complained of by defendants was the giving of instruction number one on behalf of plaintiff, which is as follows:

"The court instructs the jury that if you believe from the evidence that the defendants accepted the nails for the purchase price of which this suit is brought, knowing they were inferior in quality, or not the quality of nails contracted for and ordered by defendants, then defendants can not now object to the quality, and your verdict must be in favor of plaintiff for the amount sued for." The objection to the instruction is that under the evidence there was an im-

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plied warranty at least that the nails were to be of a certain quality; and such being the case, defendants had the right to retain the nails and show the difference between the contract price and their actual value in diminution of such contract price. The question raised has been before the supreme and appellate courts of this State in many cases. In Brown v. Weldon, 27 Mo. App. 251, and 99 Mo. 564, the suit was on a note given for the purchase price of a jack and a horse. The court held:

"In an action on a note given for the purchase price of a chattel bought for a particular purpose, either upon an express or implied warranty, and with or without fraud, it is not necessary, to enable the purchaser to avail himself of the plea of the failure of consideration, that he return or offer to return the article, or offer to rescind the contract, or that such article be wholly worthless." And: "If the purchaser retain the article and does not offer to return it, and it is not wholly worthless, the plea of failure of consideration is available to defeat a recovery on the note only to the extent of the difference between the represented and real value of the article." The principle in that case was followed in Werner v. O'Brien, 40 Mo. App. 483; Miles v. Withers, 76 Mo. App. 87; June & Co. v. Falkinburg, 89 Mo. App. 563; and Osborne & Co. v. Henry, 70 Mo. App. 19.

There is another class of cases referring to sales of manufactured articles. In Schoenberg v. Loker, 88 Mo. App. 387 the court held: "If articles are not made according to sample and are unsuited for the purpose for which made, the defendant, by retaining them and not offering to return them, is not bound thereby to pay the contract price." See also, St. Louis Brewing Assn. v. McEnroe, 80 Mo. App. 429.

There are also to be found in the reports of the State a number of decisions which plaintiff claims is the law applicable to the facts of this case. In a case

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where apples were sold on warranty, the court held: "Where a party knowingly accepts of goods of an inferior quality delivered in pursuance of a contract, he can not afterwards object to the quality of such goods." Stevens v. McKay, 40 Mo. 224. "One who accepts and receives lumber in part compliance with his contract of purchase waives the objection that its quality does not meet the requirements of the contract." [Black River Lumber Co. v. Warner, 93 Mo. 374; see also, Ashford v. Schoop, 81 Mo. App. 539.] "It is one of the established principles of the law of sales, a principle founded on the plainest details of justice, that where an article is furnished, pursuant to a contract requiring it to be of a certain quality, the buyer must at least object to its quality within a reasonable time after its receipt, else the law will treat the receipt as a final acceptance, and preclude any later objection on the ground of inferior quality." [Water & Light Co. v. City of Lamar, 140 Mo. 145.] In the latter case, the court cites the following rule laid down in Benjamin on Sales (section 703), which is as follows: "When goods are sent to a buyer in performance of the vendor's contract, the buyer is not precluded from objecting to them by merely receiving them, for receipt is one thing and acceptance another. But receipt will become acceptance if the right of rejection is not exercised within a reasonable time, or if any act be done by the buyer which he would have no right to do unless he were the owner of the goods."

Speaking for myself, I am free to say that there is at least an apparent conflict in the authorities of this State upon the question. But however that may be, I do not think, under the facts in the case, there is any doubt about the instruction being right.

After receiving the nails and ascertaining, in their judgment, that they were defective in quality, and therefore did not comply with the terms of the contract of sale, the defendants were not bound to accept them.

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The authorities are all agreed on this point. And under certain of said authorities, they were not bound to return them, nor even offer to rescind the contract, but they might have retained them and set up defect in quality in diminution of the purchase price. But when they returned a part of the nails and received credit for them and used the residue in their business, and thereby exercised ownership over them, their acts in so doing amounted to an acceptance and to a waiver of the defects in the quality of the nails. They thus not only received the goods, but in law they accepted them; which precluded them from making a defense on a suit for the purchase price that they were not as warranted. The excerpt from Mr. Benjamin's work makes a clear distinction between a receipt and an acceptance of goods under a sale.

Instructions number two and three given at the instance of the plaintiff are objected to as improper. They have no relation to the case whatever. But as they could not have been applied by the jury to the facts, we do not see how they could have prejudiced the defendant.

I am of the opinion that plaintiff was entitled to a judgment on the pleadings. It was no defense to merely allege that the nails were defective and that defendants had paid full value for them. A purchaser may, and often does, pay more for an article than its real value, and he often buys that which he knows to be defective. In order to constitute a defense, the answer should have alleged either an express or implied warranty or fraud. [Graff v. Foster, 67 Mo. 512; Stevens v. McKay, supra.] And it wholly fails to state that the nails delivered, in quality, did not comply with the terms of the contract.

For the reasons given I hold that the cause should be affirmed, but to this opinion *Smith, P. J.*, and *Ellison, J.* dissent.

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ELLISON, J.—The plaintiff is a manufacturer of nails, and those in the account sued on were to be manufactured in accordance with a sample furnished by defendants. The sale of the nails was a sale by a manufacturer by sample. And, as appears in the opinion of Judge BROADDUS, they were sold for a specific purpose.

In such character of sale there is an implied warranty that the goods will correspond to the sample. This is a well established rule of law and it distinguishes such sales from an ordinary sale of personal property *in praesenti* where the rule of *caveat emptor* would apply, where no express warranty has been taken and where an implied warranty would not arise.

In such sales by sample, which fail to conform to the sample, while the buyer is not bound to accept the goods when delivered and may refuse them; still, he may keep and use them, knowing their deficiency, and yet insist on the implied warranty by way of diminution of the contract price. [Ferguson v. Huston, 6 Mo. 414 (opinion of Judge NAPTON); Wade v. Scott, 7 Mo. 509 (opinions by Judges SCOTT and NAPTON). Judge BLAND so stated the law in Schoenberg v. Loker, 88 Mo. App. 387.

In the respect here considered a sale by sample is not different from a sale for a specific purpose (and the sale in this case was both by sample and for a specific purpose) in which instance there is an implied warranty that the chattels shall be fit for such purpose. In such case it is uniformly held that the buyer may keep the chattels and rely on the warranty in diminution of the contract price. [Brown v. Weldon, 27 Mo. App. 267-273; s. c., 99 Mo. 564; Comings v. Leedy, 114 Mo. 478; Werner v. O'Brien, 40 Mo. App. 483; Danforth v. Crookshanks, 68 Mo. App. 311; Brewing Co. v. McEnroe, 80 Mo. App. 429; New Birdsall Co. v. Keys, 99 Mo. App. 463; June & Co. v. Falkinberg, 89 Mo. App. 563.] A reference to the text writers will show that this

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is well nigh the universal rule. I refer here to Biddle on Warranties, secs. 291, 303; 2 Mechem on Sales, sec. 1844; Story on Sales, sec. 455a; Benjamin on Sales, sec. 901 (Ed. 1899).

It is sometimes suggested that the rule only applies when the warranty is express. But by reference to the cases just cited it will be seen that it is held to apply in cases where the warranty is that implied warranty which the law attaches to the contract of sale. And so it has been stated in the text books and in adjudicated cases in other States. [Muller v. Eno, 14 N. Y. 597; Holloway v. Jacoby, 120 Pa. St. 583.]

There are cases where no question of warranty is made and the vendee accepts the chattels *as in compliance* with the vendor's agreement in which it would be considered that the parties had agreed that the contract had been properly performed, as in Black River Lumber Co. v. Warner, 93 Mo. 386. But we have no such case. I do not regard the case of Water Co. v. Lamar, 140 Mo. 145, as a case like the one before us. The sale in that case was not the character of sale here and no question of implied warranty was made or suggested. A remark is made by Judge BIGGS in Ashford v. Schoop, 81 Mo. App. l. c. 545, to the effect that an acceptance of goods would waive an *implied* warranty. It can make no difference in the rights of the parties whether the warranty is express or implied. I regard the judge's statement as merely a passing remark, not arising in the case. Judge BIGGS'*s* had written the opinion in Orange Growers' Assn. v. Gorman, 76 Mo. App. 184, which was adopted by the Supreme Court in 161 Mo. 203, which it seems to me to be entirely in line with the views I entertain of this case. I have not found any cases in this State involving a question of warranty which in my view differ from what I have here written. In this connection care should be taken not to confound the right of the buyer to rescind a contract (the parties being put back *in statu quo*) and his

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right arising on a warranty. If he accepts the goods with knowledge and yet retains them, *he loses the right to rescind,* but by no means does he lose his right under the warranty. [Benjamin on Sales, sec. 901 (Ed. 1899).]

In my view, it follows from the foregoing that the trial court erred in giving the instruction set out by Judge Broaddus. I think, furthermore, that it is followed by some other instructions with which it is not easily reconciled.

The pleadings in the case do not show that plaintiff was a manufacturer; nor that the sale was by sample; nor anything in reference to an implied warranty. But notwithstanding this, the evidence, from beginning to end, was introduced and received without objection as though such matters had been formally pleaded. The plaintiff took upon itself to show, not merely that it sold to defendants at their request certain goods which were reasonably worth the price charged, as set out in the petition, but it proceeded to show that it was a manufacturer of nails; that it manufactured the nails in question for defendants on their order and by the sample furnished. Evidence in behalf of defendants was received as to the real value of the nails and of their failure to correspond with the sample as though the pleadings justified it. In such state of case we must do as the parties have done, and overlook any question as to pleading. [Hill v. Meyer Bros., 140 Mo. 433; Stewart v. Outhwaite, 141 Mo. 562; Simon v. Simcox, 75 Mo. App. 143; Pope v. Ramsey, 78 Mo. App. 157.]

I think the judgment should be reversed and the cause remanded. *Smith, P. J.,* concurs; *Broaddus, J.,* dissents in separate opinion.

OPINION ON MOTION FOR REHEARING.

ELLISON, J.—In a motion for rehearing the foregoing majority opinion is criticised by counsel for stating that the sale made by plaintiff was a sale by sample. The plaintiff is a manufacturer and sold to defendants

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a quantity of nails to be manufactured. A sample of the nails desired was exhibited to plaintiff by defendants and accepted by plaintiff as a sample of the nails to be manufactured. The plaintiff's case as shown in the examination of witnesses and instructions is put upon the theory that the sale was by sample. The jury were instructed, at plaintiff's request, that if the goods were equal to the sample the finding should be for plaintiff. Ordinarily, a sale by sample is a sale of goods then in existence in bulk but not present for examination by the buyer. Whether a sale is by sample depends upon the facts disclosing the intention of the parties. We treated the case as it was made by the parties.

But in view of the fact that there is to be a retrial of the cause, we will add that (as has been already intimated) whether the sale is to be considered as made by sample; or by a manufacturer; or for a specific purpose known to the seller, the instruction complained of by defendants should not have been given. In *each* mode of sale there is an implied warranty by the seller. In *neither* mode does the buyer waive his right to contest the contract price by accepting the goods.

The motion should be overruled.

SAMUEL CORROUGH, Appellant, v. PETER HAMILL, Respondent.

Kansas City Court of Appeals, December 19, 1904.

PLEADING: Petition: Warranty Deed: Shortage of Acres: Fraud. A petition seeking to recover money paid in a real estate transaction on the ground that there is a shortage in the number of acres recited in a general warranty deed, which petition is summarized in the opinion, is held not to state a cause of action, there being no allegation that the deed was fraudulently obtained, or that anything was omitted therefrom by fraud, accident or mistake, and without such averment the deed must be presumed to contain the final contract of the parties and measure defendant's liability.

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Appeal from Nodaway Circuit Court.—*Hon. William C. Ellison*, Judge.

AFFIRMED.

E. A. Vinsonhaler for appellant.

(1) Now, if this court is of the same opinion as the trial court, then we confidently submit that the petition here contains every essential allegation in an action for money had and received, and as sustaining it. Koopman v. Cahoon, 47 Mo. App. 357; Hull v. Watts, 95 Va. 10; 22 Enc. Pl., p. 770; McGee v. Bell, 170 Mo. 135; Land Co. v. Simpson, 20 S. W. (Tex.) 953. (2) Where land is sold in gross these rules seem to be well settled. Starkweather v. Benjamin, 32 Mich. 305; 2 Warvelle on Vendors, 974, 822; 3 Washburn on Real Property, 491; 2 Pomeroy's Equity, sec. 838 et seq.; Belknap v. Seely, 14 N. Y. 143, 98 Mo. App. 401. (3) Upon this whole record we submit that appellant should not be required to again litigate these conceded and indisputable facts; but judgment upon the verdict as returned should be entered.

Blagg & Cummins, John M. Dawson, A. F. Harvey for respondent.

(1) Appellant's petition fails to state facts sufficient to constitue a cause of action, either on the contract or mistake of fact, and if it states anything it attempts to state a cause of action in fraud and deceit. Norton v. Bohart, 105 Mo. 630; Benn v. Pritchett, 163 Mo. 560; Leicher v. Keeney, 98 Mo. App. 394; Miees v. Summerville, 85 Mo. App. 183; Brauckmann v. Leighton, 67 Mo. App. 245. (2) All negotiations and contracts are merged in the deed and any suit on the contract must be on the covenants of the deed, and evidence of all prior or contemporaneous negotiations and

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contracts are inadmissible, the deed not being ambiguous, the action not being to reform the deed and there being no fraud or mistake in the preparation of the deed. Wood v. Murphy, 47 Mo. App. 539; Brauckmann v. Leighton, 67 Mo. App. 245; Hobein v. Frick, 69 Mo. App. 263; Whelan v. Tobener, 71 Mo. App. 361; Miees v. Summerville, 85 Mo. App. 183; State ex rel. Yeoman v. Hoshaw, 98 Mo. 358; Morgan v. Porter, 103 Mo. 135; Davidson v. Manson, 146 Mo. 608. (3) Appellant can not maintain an action on the covenants of the deed, either on the facts alleged in his petition or proven at the trial, because the shortage, if any, is not great enough to amount to fraud. Wood v. Murphy, 47 Mo. App. 539.

ELLISON, J.—Plaintiff bought a tract of land of defendant lying in Nodaway county. After obtaining defendant's warranty deed thereto plaintiff discovered a shortage in the number of acres which he thought were in the tract and which defendant told him it contained. Plaintiff thereupon brought this action for the price or value of the land he alleges he paid for and did not get. On trial in the circuit court the jury returned a verdict for plaintiff in the sum of $1,000, which, upon defendant's motion, the court set aside on the ground that the petition did not state a cause of action, and plaintiff appealed from that order.

The petition alleges that plaintiff bought the land of defendant and took from him a contract of sale wherein the land was described merely as defendant's "farm in sections 10, 15 and 16; Tp. 62, R. 25, Nodaway Co. (being all the land in said sections owned by said Hamill and known as the Talbott and Terhune farms) at the price and sum of $62.50 per acre." The petition sets out a full copy of the contract and then proceeds to state that defendant afterwards executed to him his general warranty deed "whereby in consideration of $51,875" he conveyed the farm to plaintiff by proper

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specific description, which description closed with the words, "all in township 63, range 35, and containing 830 acres, and being all the land owned by Peter Hamill in the above-named sections." It is then stated in the petition that defendant by such deed warranted the title to the premises. It is further stated that, "owing to the irregular boundary of said lands it was difficult to ascertain the quantity of land embraced in said description, that he (plaintiff) was a stranger and unacquainted with the land; that he purchased same by the acre and agreed to pay and did pay in full for 830 acres of land at $62.50 per aere." That defendant stated there were that number of acres before the delivery of the deed, which statement plaintiff believed and relied upon. The petition further stated: "Plaintiff says the statements of defendant as to the number of acres conveyed by said deed were false and fraudulent; that he was deceived thereby and paid to defendant the sum of two thousand dollars in excess of what was due under a mistake of fact induced and caused by the false statements of defendant that he knew the number of acres conveyed by said deed, upon which statement plaintiff relied."

There is no allegation in the petition that the deed was fraudulently obtained nor that anything was omitted therefrom by fraud, accident or mistake. The deed therefore must be presumed to contain the final contract of the parties and to measure defendant's liability. [Davidson v. Manson, 146 Mo. 608, 619, 620.] So accepting the deed we find that it does not contain a contract, covenant or warranty that the tract contained 830 acres. The deed merely recited that it did contain that number of acres and this amounted to a mere representation—the opinion of the grantor. [Hobein v. Frick, 69 Mo. App. 263; Wood v. Murphy, 47 Mo. App. 539.] The case stated in the petition and tried by the court is wholly unlike that of McGhee v. Bell, 170 Mo. 121.

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We are of the opinion that the petition, as it stands, fails to state a cause of action and the judgment is affirmed. All concur.

LECOUTOUR BROTHERS STAIR MANUFACTURING COMPANY, Appellant, v. J. S. MADDOX et al., Respondents.

Kansas City Court of Appeals, December 19, 1904.

1. **MECHANICS' LIENS: Completion of Building: Time of Filing Lien.** When a building is substantially completed and is accepted the contractor cannot afterwards, against the will of the owner, provide some part called for in the contract but omitted in the construction, and thereby extend the time for filing his lien.

2. ———: ———: ———: **Evidence.** Where there is a dispute in regard to the necessity of certain items in a lien account being extras, necessitated by a change in the plans, which became necessary to complete the building, it is error to give a peremptory instruction for the defendant, but it should be submitted to the jury to determine whether they were necessary and so extended the time for filing lien account.

Appeal from Cooper Circuit Court.—*Hon. James E. Hazell*, Judge.

REVERSED AND REMANDED.

W. M. Williams and *W. W. Kingsbury* for appellant.

(1) Plaintiff offered substantial evidence to sustain its suit. The court can not withdraw such evidence from its consideration by a peremptory instruction. Every proposition contended for by respondent in the trial below is contradicted by the testimony of plaintiff's witnesses. Where there is any substantial

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evidence to support a case, it is error to sustain a demurrer, and for this reason the cause will be remanded. Lumber Co. v. Christopher, 62 Mo. App. 98; Blanke v. Dunnermann, 67 Mo. App. 597; Suddarth v. Robinson, 118 Mo. 293; Patterson v. Railroad, 47 Mo. App. 572; Rosenbaum v. Gilliam, 101 Mo. App. 126. (2) It is immaterial when the materials should have been delivered. The account accrued when the indebtedness became complete, and it is considered complete when the last labor is performed or the last of the material is furnished. Coal Co. v. Ryan, 48 Mo. 516; Miller v. Whitelaw, 28 Mo. App. 639. (3) The conflict in the evidence as to the particular dates upon which certain of the "extras" were delivered, is also immaterial. The testimony conclusively shows that they were furnished between the time when the account began to run and the date when the account accrued. Mesker v. Cutler, 51 Mo. App. 344; Hayden v. Wulfing, 19 Mo. App. 353; McDermott v. Claas, 104 Mo. 23; Mill Co. v. Allison, 138 Mo. 51. (4) Under the law and the evidence, plaintiff is entitled to a judgment enforcing the lien. Lumber Co. v. Meyers, 87 Mo. App. 671; Miller v. Whitelaw, 48 Mo. App. 639; Bruns v. Braun, 35 Mo. App. 337; Extinguisher Co. v. Schwartz Bros., 165 Mo. 171.

John Cosgrove for respondents.

(1) Upon the record, the judgment of the trial court should be affirmed. The judgment is for the right party. R. S. 1899, sec. 865; Vogg v. Railroad, 138 Mo. 181. (2) The judgment is the only one that could have been rendered on the evidence, and although the instruction if incorrect, the judgment should nevertheless be affirmed. Greer v. Bank, 128 Mo. 575. (3) The transoms charged under date of January 23, 1903, although ordered by Maddox at an earlier date, and agreed to be delivered by the appellant at such prior

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date, could not extend the time for filing a lien against respondent's house, in consequence of the omission of the appellant to deliver them as ordered, and although such failure to deliver was unintentional, this will not extend the time of the accruing of the indebtedness and thereby extend the time within which to file the lien account. Drey v. Ridpath, 60 Mo. App. 134; Mfg. Co. v. Burns & Co., 59 Mo. App. 391. (4) The building in this case was accepted by the respondent as completed long before January 23, 1903, and Maddox had no authority after that at his own instance, to make any admission or to create any indebtedness with the appellant which would bind the property of the respondent, although the transoms charged in the items under date of January 23, should have been furnished by him under his contract with respondent. Extinguisher Co. v. Elevator Co., 165 Mo. 180.

BROADDUS, J.—This is a suit by a subcontractor to enforce a mechanic's lien for materials furnished. The only question raised by the parties is, whether the lien was filed within four months from the time the work was completed.

Maddox contracted with Dauwalter to do the carpenter's work on the construction of his building according to certain plans and specifications. Maddox then contracted with plaintiff, whose place of business was in St. Louis, who agreed to furnish the materials included in his itemized statement for the sum of $1,198. These materials were furnished on August 9th and October 10, 1902. Other materials were ordered by Maddox at different times during the progress of the work. There was evidence tending to show that such extra materials became necessary by reason of changes in the plans and materials made by Dauwalter. They were delivered at various dates between October, 1902, and the 23d of January, 1903, and are charged as extras.

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It is not disputed that Dauwalter moved into the house before it was completed. But it is insisted by him that the house was substantially completed. Yet, there was evidence to the effect that after he moved into the house he occupied only the upper story and that it was not until late in January that the mantels had been set, the floors laid, the scotia put upon the stairs, the transoms placed and the house finished.

The last item for work done was shipped from St. Louis January 23. The lien was filed on the 1st day of May, 1903—within four months from said last named date. The lien account consists of items for the material (which was mill work) originally ordered by Maddox, the last of which was shipped from St. Louis October 10th. The materials charged as extras in the account were furnished at different times from October 10th until December 31st except the last in dispute which was furnished January 23rd, as before stated. The charge for these extras is $140.72. The account is credited by cash $500 August 20th and $500 October 17th. There are several other credits for articles not used dated April 18, 1903, which reduced the sum charged for extras to $102.35.

It will be seen from the statement of the articles for extras, including the last for transoms, that if they are not a proper charge against the building, there was no lien. In regard to this last item, the defendant and his witnesses testified that they were provided for in the original plans and specifications. The plaintiff's witnesses testified to the contrary, and that they were furnished as extras.

At the close of all the evidence the court sitting as a jury gave a declaration that the finding ought to be for the defendant, and accordingly so found. Plaintiff appealed.

The general rule is that the lien must be filed within four months from the time the work is done or the materials furnished in order to comply with the

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statute. There is no dispute but what the last item of plaintiff's account was furnished within the proper time. It is not denied but what the transoms that constituted the item were furnished by plaintiff at the request of the contractor and were used in the building.

But it is contended by the defendant that the house had been substantially completed at the time they were furnished, and that it had been received and occupied by him; that the transoms were not furnished to him but to another person; that he had them put in himself; and that the object of having them included in the lien was to bring plaintiff's account within the time limited by the statute.

Much of the work was done after defendant had moved into and was occupying the building. There was no evidence to show that it had been tendered and accepted by him as completed when he moved into it. The case does not therefore fall within the rule as insisted by defendant and announced in Fire Extinguisher Co. v. Farmers' Elevator Co., 165 Mo. 171, where the court said that, "when the building is substantially completed and the contractor tenders it as complete and it is accepted as such by the owner, the contractor can not afterwards, at his own instance, and against the will of the owner, perform some part that was called for in the contract, but which has been omitted in the construction, and thereby extend the time for filing his lien."

But as there was evidence tending to show that the material mentioned in the bill of extras was necessitated by a change in the plans and specifications in some particulars, and that said extras, including the transoms, were necessary to complete the building, it was error to disregard such evidence. As that was a disputed fact there should have been a finding one way or the other, and consequently the declaration of law should not have been given.

As we view the case the sole issue between the par-

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ties is whether the said extras, including the transoms, were necessitated and furnished to complete the building because of the modifications in the original contract.

Reversed and remanded. All concur.

MERCHANTS' BANK OF JEFFERSON CITY, Respondent, v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

Kansas City Court of Appeals, December 19, 1904.

1. **BANKS AND BANKING: Forgery: Principal and Agent: Indorsement of Check.** A bank buying a check has no right to believe the indorsement of the payee genuine because witnessed by drawer's agent, where the agent in witnessing it is not in the line of his duty as agent.

2. ———: ———: **Indorsement of Check.** Before purchasing a check a bank must know payee's indorsement to be genuine, since without such indorsement there is no privity of contract between the drawer and the drawee.

3. ———: ———: **Principal and Agent.** A principal is not liable for the forgery of his agent especially when acting without the scope of his authority.

Appeal from Cole Circuit Court.—*Hon. James E. Hazell,* Judge.

AFFIRMED.

Silver & Brown for appellant.

(1) A bank is bound to ascertain that the person presenting a check is the one entitled to receive payment under the penalty of refunding either to the party entitled or to the drawer. Milliard v. Bank, 3 McArthur 54; Bank v. Cook, 73 Pa. St. 483; Johnson v. Bank, 6 Hun 124; Welsh v. Bank, 73 N. Y. 424; Thompson v. Bank, 82 N. Y. 1; Bank v. Bank, 30 Md. 11. (2) Nor

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can the defendant in this case be held liable on the theory that the act of Hendricks in forging the indorsement of Mrs. Crandall and obtaining the money thereon and placing it to his credit at the bank, was the act of the defendant and one which renders it liable as contended for by respondent. Bigelow on Bills and Notes (Students' Series), p. 190; Ins. Co. v. Worchester, 42 Conn. 391; Welsh v. Bank, 73 N. Y. 424. (3) Nor does the fact that the defendant is a corporation and that Hendricks was one of its agents make the case more favorable for plaintiff and entitle it to a recovery in this suit. A corporation is only liable for the acts of its agents while the latter is acting within the scope of his employment. The act of the servant must pertain to the particular duties of the employment. Stringer v. Railroad, 96 Mo. 299; Snyder v. Railroad, 60 Mo. 413; Cousins v. Railroad, 66 Mo. 572; Farber v. Railroad, 116 Mo. 81; Walker v. Railroad, 121 Mo. 575; Sparks v. Trans. Co., 104 Mo. 540; Degman v. Thoroughman, 88 Mo. App. 62. (4) Defendant made no contract with plaintiff that it would pay the latter the amount it paid on the draft to the Sedalia bank. No privity of contract existed between plaintiff and defendant and the latter on this ground is not liable in this action. Bank v. Whitman, 94 U. S. 343; Dickman v. Coates, 79 Mo. 250; Coates v. Doran, 83 Mo. 337; Case v. Packing Co., 79 S. W. 732; Utley v. Hill, 155 Mo. 232.

W. S. Pope for respondent.

(1) Plaintiff had a right to believe the check was genuine when presented by defendant's own agent, and the signature of the payee thereto witnessed by him, as such. It was an usual and ordinary business transaction between the parties, in which the plaintiff had a right to act as it did, and the defendant's agent was apparently acting within the scope of his authority and

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for his principal. (2) The evidence fails to disclose any fault or negligence on the part of plaintiff in the transaction, and therefore the consequences of the wrong of defendant's agent must not be charged to it. (3) As the matter stands plaintiff cashed the check for defendant.

BROADDUS, J.—This suit was instituted before a justice's court upon the following check:

No. 210 Office Of

The Prudential Insurance Co. of America.

Sedalia, Mo., Oct. 7, 1903.

Third National Bank, Sedalia, Mo.

Pay to the order of Martha A. Crandall, One Hundred Thirty-five and 54-100 Dollars in full settlement of claim under Policies Nos. 6,439,662 and 7,584,494 and charge same to account of

The Prudential Insurance Company of America.

Home Office: Newark, N. J.

Paid Oct. 10, 1903.

Third National Bank,

Sedalia, Mo.

$135.54 J. H. Sullens, Supt.

On the back of said check were the following indorsements:

her

Martha A. X Crandall.

mark

J. F. Hendrick, Ass't Supt.

Pay to the order of the Merchants' National Bank St. Louis, Mo.

Merchants' Bank of Jefferson City, Mo.

G. E. Lohman, Cash.

Pay to the order of any bank or banker. The Mechanics' National Bank, Oct. 9, 1903, St. Louis, Mo.

H. P. Hilliard, Cashier.

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Pay to the order of any bank or banker. The Mechanics' National Bank, Oct. 9, 1903.

H. P. HILLIARD, Cashier.

The evidence disclosed that one, John F. Hendricks, was the local agent and designated as defendant's district superintendent at Jefferson City, Mo.; that one Crandall, deceased, carried two policies on his life in defendant company, the same being in favor of his wife, Martha A. Crandall; that J. H. Sullens, whose office was at Sedalia, Missouri, was defendant's district superintendent, and drew the check in suit payable to said Martha A. Crandall in payment of said policies; that said check was sent to said J. F. Hendricks at Jefferson City, Missouri, to be delivered to Mrs. Crandall who also lived at said last named city; that said Hendricks instead of delivering the check to Mrs. Crandall, forged her indorsement on it, took it to the plaintiff bank and on said forged indorsement obtained from plaintiff the amount in money called for by the check, and the same was placed to his credit by plaintiff; that Sullens, after having received information of the forgery, notified the Sedalia bank on which the check was drawn, and which had previously honored the check, of the forgery; and that the Sedalia bank demanded of plaintiff bank the return of the amount of the check and the same was repaid by it to the former. It was further shown, over the objection of defendant, that it was the habit of plaintiff bank to cash drafts for Hendricks. And it was further shown that Hendricks had no authority and it was not in the line of his duty to sign checks of the defendant.

The cause was tried before the court sitting as a jury. The finding and judgment were for the plaintiff and defendant appealed.

The theory of plaintiff is that it had the right to believe that the check was genuine when presented by

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defendant's agent and the signature of the payee witnessed by him as such. The weakness of this position is that the act of said Hendricks in attesting the signature of the payee, Mrs. Crandall, was not an act performed in the line of his duty as defendant's agent. Nor was he apparently acting within the scope of his authority as agent for his principal. It was an act foreign to defendant's business and one which could have been performed by any one who was a competent witness.

And it is also insisted that there is no fault or negligence to be attributed to plaintiff in the transaction. We think otherwise. The plaintiff before it purchased the check was bound to know that the signature of the payee was genuine. Bank v. Bank, 109 Mo. App. 665. As the indorsement of Mrs. Crandall's name on the back of the check was without her authority it created no privity of contract between the drawer and drawee. [Bank v. Bank, supra; Bank v. Whitman, 94 U. S. 343.]

Defendant was not liable for the forgery of its agent, especially when not acting within the scope of his authority as such. The case is too plain for argument.

Defendant questions the sufficiency of plaintiff's statement, but as it has no case upon the merits it is useless to encumber this opinion further.

Reversed. All concur.

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WILLIAM WENDLETON, Agent, Defendant in Error, v. W. T. KINGERY, Plaintiff in Error.

Kansas City Court of Appeals, December 19, 1904.

1. **APPELLATE PRACTICE: Bill of Exceptions: Record Proper.** Where there is no bill of exceptions filed in the time required by the order of the trial court, the appellate court can not consider the merits of controversies arising during the trial and must confine its review to the record proper.

2. **PLEADING: Action: Capacity to Sue: Repeal of Statute.** An officer whose right to sue is statutory has no capacity to maintain such suit after the repeal of the statute creating his office.

3. **———: Capacity to Sue: Demurrer: Waiver: Justices' Courts.** A failure to demur in the trial court on the ground that the plaintiff has no capacity to sue waives such objection, but this rule has no application to proceedings in the justices' courts, and, on appeal to the circuit court the rules of practice of the latter govern the proceedings but not its rules of pleading.

Error to Morgan Circuit Court.—*Hon. James E. Hazell,* Judge.

REVERSED.

John F. Gibbs for plaintiff in error.

(1) Defendant in error can not maintain this action as agent of the probate court of Morgan county, for the reason that probate courts are of limited jurisdiction, their powers being conferred solely by statute. Ford Admr. v. Talmage, 36 Mo. App. 65; Butler v. Lawson, 72 Mo. 227. (2) Although the probate court had the authority under the provisions of section 257, chap. 1, art. 11, R. S. 1889, to appoint such agent, the Legislature by the provisions of the act approved May 11, 1899, (see Session Acts of 1899, page 41) repealed the law conferring such jurisdiction on the probate court, which repeal was without saving clause and divested

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the court of jurisdiction; for "If a law conferring jurisdiction is repealed—without saving clause, the right to exercise jurisdiction is lost." 23 Am. and Eng. Ency. of Law (1 Ed.), p. 506; Holcomb et al. v. Boynton, 37 N. E. 1031.

D. E. Wray and *W. T. S. Agee* for defendant in error.

(1) The abstract of the record filed by plaintiff in error does not show a record entry or order filing the bill of exceptions. Goodson & Wright v. Bevan, 89 Mo. App. 162; Lucas v. Huff, 92 Mo. App. 369; Allen v. Funk, 85 Mo. App. 460; Burdick v. Life Assn., 86 Mo. App. 94. (2) The objection of plaintiff in error to the right of defendant in error to maintain his suit is such an objection as must have been raised by demurrer and comes too late in this court. Taber v. Wilson, 34 Mo. App. 89; Spillane v. Railroad, 111 Mo. 555.

BROADDUS, J.—At the May term, 1891, of the probate court of Morgan county the plaintiff—defendant in error—was appointed agent to take charge of several acres of land belonging to the estate of Charles Fitzgerald, deceased. His appointment was made under authority conferred upon probate courts by section 257, Revised Statutes 1889. During the year 1898 the defendant—plaintiff in error—came into possession of said land. On the 9th day of December, 1902, while defendant was in such possession, plaintiff commenced this suit for the rent thereof. The plaintiff recovered judgment and the defendant sued out this writ of error. By an act approved May 11, 1899, said section 257 was repealed.

The statement on which the cause was tried, omitting the caption, is as follows: "Plaintiff states that by order of the probate court duly entered, he was appointed agent of the estate of Charles Fitzgerald, de-

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ceased, to take charge of and rent certain lands belonging to said estate; that in obedience to said order he took charge of said lands and rented same; that in the fall of the year 1898 he sold the rent crop grown on said premises that year to the defendant, at and for the price and sum of seventeen dollars; that at said date he rented to said defendant said lands belonging to said estate as aforesaid at the price of seventeen dollars per year; that said defendant occupied said land under said contract of rental for a period of four years; that the rent of said lands and premises for the period aforesaid amounts to the sum of sixty-eight dollars,'' etc.

As the defendant—plaintiff in error—has not in his abstract set out any order of the court showing that a bill of exceptions has been filed within the time prescribed by the court's order, or any statement to that effect, we can not enter into the merits of the controversy arising during the trial. We can therefore consider only such errors as may be shown by the record proper.

It appears from the face of the petition that plaintiff had no right to sue as his office as agent ceased when the office itself was abolished by the act of 1899 repealing said section 257 under which he was appointed. The point is made by defendant in error that it is too late to raise the question as to his capacity to sue. Section 598 of the code in specifying upon what grounds the defendant may demur has the following: ''that the plaintiff has not the legal capacity to sue.'' It has often been decided that in such cases a failure to demur waives the objection. [Spillane v. Railroad, 111 Mo. 555, and cases cited.]

But as this case was instituted in a justice's court said section of the code has no application. The rules governing pleadings in justices' courts do not provide for a demurrer. When a case is appealed to the circuit court the rules of practice in the latter shall gov-

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ern but not its rules of pleading. [Section 4080, Revised Statutes 1899.]

The record proper shows that the plaintiff has no legal capacity to sue, for which reason the cause is reversed. All concur.

JULIUS COTTON, Respondent, v. H. E. HUSTON, Appellant.

Kansas City Court of Appeals, December 19, 1904.

FENCES AND INCLOSURES: Division Fences: Evidence: Peremptory Instruction. On the evidence a peremptory instruction to find for the plaintiff is sustained.

Appeal from Pettis Circuit Court.—*Hon. George F. Longan,* Judge.

AFFIRMED.

Shain & Barnett for appellant.

(1) Division fences or "inside fences" are not necessarily partition fences. Our courts have repeatedly held that one can protect himself by building along a division line a lawful fence. Demetz v. Benton, 35 Mo. App. 559; Fenton v. Montgomery, 19 Mo. App. 158. (2) The court committed error in giving peremptory instruction in nature of a demurrer directing the jury to find for plaintiff. There were several questions of fact in evidence that should have been submitted to the jury under proper instructions. Oriley v. Diss, 41 Mo. App. 189. There are no such covenants shown to exist as create an agreement for a partition fence. Mackler v. Cramer, 32 Mo. App. 542.

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Cashman & Bohling for respondent.

(1) The evidence conclusively shows that the cattle broke through an unlawful partition fence, and that part of the fence which the defendant was bound to keep in repair. Hopkins v. Ott, 57 Mo. App. 292; Field v. Bogie, 72 Mo. App. 185. (2) If the defendant is entitled to any damages by reason of the cattle breaking into his corn field Mrs. Decker, the owner of the pasture, and not the plaintiff, is liable to him. Raddick v. Newburn, 76 Mo. 423. (3) The court did not err in giving the peremptory instruction. The uncontradicted evidence shows, and defendant by his answer admits that his corn field and the Decker pasture were divided by a partition fence. (4) Where cattle break into the defendant's land by reason of a defect in an interior fence which he was bound to repair, he can not claim damages for the injuries done to his crop. Authorities supra.

SMITH, P. J.—Action in replevin. The case disclosed by the evidence contained in the record may be stated in about this way: The plaintiff's inclosure was separated from that of the defendant by a division fence, something like 200 rods in length, which had been constructed nearly twenty years previously under an agreement between the three adjoining landed proprietors to the effect that the one under whom plaintiff claimed would construct and maintain the north one hundred rods of said fence, and the other, under whom defendant claimed, would construct and maintain the south one hundred rods thereof. It appears that the fence was constructed of posts and three strands of wire stretched and fastened with staples to such posts. It further appears that the north one hundred rods of the fence was thrown down by defendant for a considerable distance and at other places therein was allowed to get out of repair so that it was wholly insufficient

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to turn stock of any kind. The plaintiff turned into his inclosure upwards of one hundred head of cattle, of which he was the owner, to graze on the grass thereon growing, and while there they broke through that part of the division fence which the defendant was bound to maintain, and entered his inclosure, damaging his growing crop of corn. The defendant drove all of them out except three head which he detained for the damage that had been done to his growing crop of corn. The plaintiff brought this action of replevin to recover possession of the same. There was a trial and at the conclusion of the evidence which, with little or no contradiction, tended to prove the facts in substance as already stated, the court gave for plaintiff a peremptory instruction telling the jury that under the pleadings, stipulations and evidence to return a verdict for plaintiff for $100—the agreed value of the cattle which the defendant had disposed of and did not have in his possession. The judgment was given accordingly, and defendant appealed.

In view of the law as declared by us in several analagous cases, we do not think the propriety of the action of the court in giving said instruction is open to question. [O'Riley v. Diss, 41 Mo. App. 184; Hopkins v. Ott, 57 Mo. App. 292; Field v. Bogie, 72 Mo. App. 185; Jackson v. Fulton, 87 Mo. App. 228.] To add anything to what is said in these cases would be supererogative.

The judgment will be affirmed. All concur.

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JOHN A. STOBIE, Respondent, v. JOHN EARP, Appellant.

Kansas City Court of Appeals, December 19, 1904.

1. **CONTRACT: Evidence: Verdict.** A promise or contract need not be evidenced by precise words or any particular formula of expression, but circumstances and reasonable inferences therefrom may be sufficient to sustain a verdict.

2. ———: ———: **Instructions.** Instructions relating to the existence of a contract are sufficient to sustain the verdict.

Appeal from Saline Circuit Court.—*Hon. Samuel Davis,* Judge.

AFFIRMED.

R. B. Ruff and *Alf. F. Rector* for appellants.

(1) The demurrer to the evidence offered by the defendant at the close of the case should have been given. (2) Instruction number one given for the respondent should not have been given. There was no evidence to base it upon. (3) The court erred in refusing to give instruction number three, asked by the appellant. Devitt v. Railroad, 50 Mo. 302. (4) Instruction number four, asked by defendant and refused by the court should have been given. State v. Gates, 20 Mo. 400.

T. H. Harvey for respondent.

(1) The court properly overruled defendant's instruction in the nature of a demurrer to the evidence. (2) Instruction number one on behalf of plaintiff was the law of the case and properly given. (3) The court committed no error in refusing to give instruction number three, asked by defendant. Perrette v. Kansas City, 162 Mo. 238. (4) Instruction number four was properly refused by the court.

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ELLISON, J.—Plaintiff brought his action against defendant with attachment in and for seven hundred dollars. The attachment was dismissed and plaintiff had judgment on the merits, whereupon defendant appealed.

It appears that plaintiff leased his farm for one year to defendant for money rent. Afterwards, plaintiff purchased defendant's growing crop and his interest in the lease (save his right to continue in the house) for seven hundred dollars which plaintiff paid him. Afterwards, for satisfactory reasons (the crop not being yet matured) the parties agreed that defendant should again become the tenant of plaintiff and should render to plaintiff a share of the crop as rent. Afterwards the wheat was harvested. It was then sold by plaintiff, he paying over to defendant the latter's portion of the sale money.

Plaintiff claims that when defendant became his tenant for a share of the crop it was understood and agreed between them that defendant was to return to plaintiff the seven hundred dollars paid him for the crop. Defendant denies that he so agreed, and contends that no matter what plaintiff may have understood, that he did not contract to return or pay back the seven hundred dollars. On that issue the jury returned a verdict for plaintiff for seven hundred dollars and interest.

We think there is substantial evidence (the circumstances and reasonable inferences considered) to sustain the verdict. Plaintiff admitted in his testimony that defendant did not say, in express words, that he would pay back the seven hundred dollars he had received of plaintiff, but his testimony was such as to authorize the jury to say that such was the understanding of each party. A promise or contract need not be evidenced by precise words, or any particular formula of expression.

We find no such substantial objection to the instructions as would authorize us to reverse the judg-

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ment. The principal ones asked by either party were given. Number three, refused for defendant, in all substantial respects was embraced within one given. Instruction number four, on the question of preponderance of evidence, was likewise properly refused since that was properly covered in another given at defendant's instance.

We have considered the record as presented, in connection with the oral and printed argument of counsel, and find nothing to justify our interference.

The judgment is affirmed. All concur.

STATE OF MISSOURI, Respondent, v. WILLIAM P. SULLIVAN, Appellant.

Kansas City Court of Appeals, December 19, 1904.

1. **INDICTMENT: Grand Jury: Prosecuting Attorney: Attorney-General: Statutory Construction.** When the Attorney-General is called by the Governor under section 4940, Revised Statutes 1899, to aid the prosecuting attorney, he has the same rights and duties in regard to the grand jury that the prosecuting attorney has and may be present before them to give advice and examine witnesses; and the fact that he does so without objection from the jury will imply their consent thereto.

2. ——: ——: ——: ——: ——. The fact that the circuit judge, prosecuting attorney and grand jury may request the Governor to order the Attorney-General to aid the local prosecutor can only give emphasis to the necessity, but is unnecessary to the exercise of such power by the Governor.

3. ——: ——: **Stenographer: Harmless Error: Statutory Construction.** The whole framework of the grand jury's organization and the safeguard of secrecy in its deliberations excludes the idea that anyone save the officers especially mentioned may sit in its presence or aid in the performance of its duties; and the presence of a stenographer, though a court official, and sworn to keep secret the proceedings, is a manifest impropriety, however pressing may be the necessity therefor; but though improper and irregular such fact does not avoid the action of the jury unless it appear that the defendant was harmed or prejudiced thereby.

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4. ———: ———: **Absence of Member.** It can make no difference to defendant that a juror was absent at a time when defendant and the charge against him were not under consideration.

5. **BRIBERY: Common Law: Legislator.** It was an offense at common law to bribe or attempt to bribe a legislative officer.

6. ———: **Solicitation of: Common Law: Misdemeanor.** While there is no statute on the subject, yet to solicit a bribe is a misdemeanor under the common law in force in this State.

7. ———: **Common Law: Felony: Misdemeanor.** At common law to bribe a judicial officer is a felony, but it is in doubt whether it was a felony or misdemeanor to bribe other officers.

8. ———: **Solicitation of: Common Law: Misdemeanor.** Any unlawful step necessary or useful towards committing a misdemeanor when willfully taken, is a misdemeanor; and the soliciting of a bribe is a step—an act, and not a mere desire—toward the commission of an offense, and, therefore, is a misdemeanor.

9. ———: ———: ———: **Felony: Misdemeanor.** To accept a bribe is a felony under the statute of Missouri, and to solicit the commission of a felony is at common law a misdemeanor; in this State the statute makes it a felony to bribe a legislative officer, and a senator who solicits a bribe commits a common-law misdemeanor.

10. **APPELLATE AND TRIAL PRACTICE: Weighing Evidence: Jury.** The issue or guilt is not triable in the appellate court, but must be determined by the jury; the trial court, having a better opportunity to weigh the evidence, is intrusted with far greater discretion than the appellate court, which can alone determine whether there is substantial evidence to support the verdict.

11. **BRIBERY: Evidence.** The evidence relating to the solicitation of a bribe by a State senator is considered and held sufficient to send the question to the jury and to support a verdict of guilty.

Appeal from Cole Circuit Court.—*Hon. H. C. Timmonds,* Judge.

AFFIRMED.

W. S. Pope for appellant.

(1) The case of People v. Walsh, 65 Ill. 58, is relied upon by the State in this case. It decides that

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soliciting a bribe is a misdemeanor at common law, and punishable as such; but it further decides that where a defendant was convicted upon the unsupported testimony of a single witness, who was impeached, and shown to have been actuated by great personal hostility to defendant, a person of good character, the conviction could not stand. (2) The defendant in this case was convicted on the unsupported testimony of Whitney Layton, whose mission here was to secure the passage of a bill favorable to his interests. He is contradicted by the defendant, Senator Smith, Emmet Newton, and others, and from his own testimony. we gather that he was not in Jefferson City, without the means, as well as the inclination to secure favorable legislation by unclean methods. (3) There are two other cases bearing upon this question, to which the attention of the court is called, viz.: State v. Ellis, 33 N. J. L. 102; Hutchinson v. State, 36 Texas 293. The statutes of Illinois leave the common law in that State in about the same condition as in Missouri. (4) At the time of the settlement of this country, by the English (4th year, of reign of James I.), there was no law punishing anyone for bribery, except judges, and that was only as a misdemeanor. This was not called to the attention of the Illinois court, nor considered by it in its opinion. (5) The law of England punishing soliciting a bribe by members of Parliament was not enacted until the reign of Victoria, the latest and most comprehensive enactment on the subject being 52 and 53 Victoria, c. 69, sec. 1. Enactments since the fourth year of the reign of James I., are not a part of the common law here. Estate of Wm. G. Williams, 62 Mo. App. 346.

Edward C. Crow, Attorney-General, for respondent.

(1) The allegations in the indictment above mentioned are sufficient and the indictment is a legal

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charge. State v. Graham, 96 Mo. 120; State v. Biebush, 32 Mo. 276; 3 Ency. of Pl. and Prac., 100, 101, 696, 699; 25 Mich. 50; 3 Chitty, Criminal Law, 992; 29 Ind. 20; 9 Allen (Mass.) 274; 37 Mich. 118; 4 Hill (N. Y.) 133; 54 Pa. St. 210; 1 McCord (S. Car.) 31; Rex v. Higgins, 2 East 5. (2) Right of Attorney-General to go before grand jury. R. S. 1899, sec. 4940. (3) Right of stenographer to be in grand jury room. U. S. v. Simmons, 46 Fed. 65; 148 Ind. 610; 5 Ind. App. 356; 70 Vt. 341. (4) Solicitation to commit some crimes is of itself a substantive crime. Cox v. People, 82 Ill. 191; State v. Bower, 15 L. R. A. 199; Rex v. Higgins, 2 East 5. (5) Is solicitation of a bribe an offense in Missouri? R. S. 1899, secs. 4151, 4152; King v. Higgins, 2 East R. P. 5; Young's case cited in 2 East R. P. P. 14 and 16; Bishop's Criminal Law, secs. 84-89, and notes; 97 Am. Dec. 709; 1 Bishop's New Criminal Law (8 Ed.), sec. 767; Walsh v. People, 65 Ill. 58; U. S. v. Worll, 2 Dallas 384; Heffelton v. Solicitor, Cook, 88; 2 Bishop's New Criminal Law, secs. 88 and 89; 1 Bishop's Criminal Law (8 Ed.), secs. 768a, 768b, 768c and 768d. (6) It must be accepted as true that bribery of others than a judge or those connected with the administration of the law, was an offense at common law. This being so, it certainly is an indictable offense at common law for one to solicit a bribe. Com. v. Flagg, 135 Mass. —; Walsh v. People, 65 Ill. 58; Rex v. Vaughn, 4 Bunower R. P. 2494; King v. Higgin, 2 East R. P. P. 14 and 16; 2 Bishop's New Criminal Law, sec. 87; State v. Hayes, 78 Mo. 307; 74 Mo. 24; 101 Mo. 471. (7) Bribery is crime classed as a felony in Missouri. A solicitation to commit bribery is an offense. State v. Hayes, 78 Mo. 316; Com. v. Jacobs, 9 Allen 274; People v. Bush, 4 Hill 133; King v. Higgins, 2 East 5; 1 Bishop's Criminal Law, sec. 767; 25 L. R. A. 434; State v. Avery, 7 Conn. 266; Com. v. Randolph, 146 Pa. St. 83; Rex v. Higgins, 2 East 5; Com. v. Randolph, 146 Pa. St. 95; 1 Chitty's Criminal

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Law, sec. 768; State v. Hayes, 78 Mo. 316. (8) Difference between Missouri and Texas statutes. The case cited in 36 Texas 293, is not in point, because of Penal Code, c. 1, art. 3 of Texas. R. S. 1899, sec. 4151. The courts of Missouri hold that common law offenses are indictable in our State. State v. Snyder, 44 Mo. App. 430; 80 Mo. 454. (9) Similarity of Missouri and Illinois statutes. The case of Walsh v. People, 65 Ill. 58, is expressly in point here. The statutes of Illinois as to the common law are almost identical with our own. (10) The verdict is sustained by the evidence. 74 Mo. App. 627, 152 Mo. 257.

ELLISON, J.—The defendant, being a member of the Missouri State Senate, was indicted, tried and convicted on the charge of soliciting a bribe for his vote as a Senator on a bill then pending in the Senate. A change of venue from Judge Hazell, judge of the circuit court of Cole county, was taken and the case was tried in that county by Judge H. C. Timmonds of the Twenty-sixth circuit. Defendant appealed to this court.

On its face, we regard the indictment as well drawn. It sets forth in plain language the official position of defendant, the pendency in the Senate of the legislative bill and of defendant's duty to act thereon. It charges from whom he solicited the bribe and the amount thereof, and the official action he would take on the bill if the sum mentioned was paid him. The venue and all other technical requirements were properly charged and we discover nothing to justify a criticism.

There was, however, objection made to the indictment by way of a plea in abatement wherein it was stated that the cause should be abated on the ground, first, that the Attorney-General of the State appeared before the grand jury while it was considering whether a bill of indictment should be found; second, that a stenographer, not a member of the jury, was permitted

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to attend the session of the jury and take stenographic notes of the evidence heard in the consideration of whether a bill should be found; third, that one of the members of the grand jury was absent during the time the jury had under investigation the charge against defendant; and that said juror returned and voted to find the present bill on information of what the evidence was which he received from other members of the jury and the stenographer.

An answer to this plea was filed by the State in which it was admitted that the Attorney-General and also a stenographer were present at different times with the grand jury while the present bill was under consideration; that the Attorney-General assisted in the examination of witnesses and the stenographer made notes of the evidence heard, but that neither of them took part in the deliberation of the jury, nor were they present when the jury voted to find the bill.

The defendant demurred to the answer on the ground that it showed no defense to the plea in abatement. The trial court overruled the demurrer and the plea; whereupon the cause proceeded to trial which, as before stated, resulted in a verdict of guilty.

2. In considering the demurrer to the State's answer we must assume the allegations of such answer to be true. We have just stated that those allegations admitted the Attorney-General's attendance on the session of the grand jury. But the answer further alleged that his acts were justified and were legal and proper by virtue of the act of the Governor taken under the statute (section 4940, Revised Statutes 1899) which reads as follows: "When directed by the Governor, he (the Attorney-General), shall aid any prosecuting attorney in the discharge of his duties." It was further alleged that the following communication was signed by James E. Hazell, judge, by R. P. Stone, the prosecuting attorney, and the members of the grand jury, viz.:

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"Jefferson City, Mo., March 31, 1903.

"Hon. A. M. Dockery, Governor: Dear Sir:—We, the judge, prosecuting attorney and grand jury of Cole county, respectfully ask that you request Hon. E. C. Crow, Attorney-General, to assist the jury in its investigations in boodling, etc."

That in pursuance of such request, the Governor gave the following written order or direction to the Attorney-General:

"St. Louis, April 1, 1903.

"Hon. E. C. Crow, Attorney-General, Jefferson City, Mo.: The circuit judge, prosecuting attorney and grand jury of Cole county having requested your service, under the authority of section 4940 of the Revised Statutes, I hereby direct you to aid the prosecuting attorney of Cole county in the discharge of his duties. A. M. Dockery, Governor."

In the case of State v. Hays, 23 Mo. 287, James B. Gardenshire, Esq., then Attorney-General, appeared at the trial assisting the circuit attorney in the prosecution. He did so at the circuit attorney's request and with the consent of the trial court, though without an order from the Governor; and it was held that he had the right, on such request and consent, notwithstanding there was no direction from the Governor.

That, however, was taking part in the case in open court, under the eye and protection of the court and where the proceedings are open to the public, and where secrecy concerning any movement in the case is not tolerated. While the proceedings in which the Attorney-General took part in this case were before the grand jury where the conditions are different and where the law, for good reasons, enjoins secrecy, and where only certain designated persons, outside the members of the jury, ought to go. But the organization of the grand jury, its proceedings and the duty of dif-

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ferent officers of the State in aid of its functions are regulated by law, and we have set out the statute which makes it become the duty of the Attorney-General, when directed by the Governor, to assist the prosecuting attorney in the discharge of his duties. Among the duties of the latter, is that of attendance on the grand jury, to aid in the examination of witnesses and to advise the jury concerning any matter before it. It is true the statute (section 2496) makes it the duty of the prosecuting attorney to examine witnesses and give advice when required by the grand jury, and there was no express showing that the grand jury made such request of the prosecuting attorney. It is not necessary that there be a formal request and it is not the practice to require it. The fact that he does so without objection from the jury will imply their being willing. Besides, the grand jury did expressly request that the Attorney-General assist in the investigation. It undoubtedly follows that upon the action of the Governor it became the right and the duty of the Attorney-General to perform the acts of which the defendant complains. The request of Judge HAZELL, the prosecuting attorney and the grand jury was not necessary or requisite to the power of the Governor, but such request emphasized the necessity for his action and justified an exercise of the authority with which he is invested by the statute. We rule the point against defendant.

The answer to the plea in abatement not only admits that a stenographer was present with the jury during its deliberations and took down the testimony of witnesses, but it alleges that he was the court stenographer and a sworn officer and that in addition he was sworn by the foreman not to divulge any matters transpiring before the jury. It was furthermore alleged that he was not present when the jury were deliberating or voting on the indictment, and that the presence and action of such stenographer did not in any manner operate to the prejudice of the defendant.

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The grand jury is known to the law as a secret body and every safe-guard has been adopted, consistent with its performance of duty, to preserve the secrecy of all that takes place in its proceedings and investigations. The statute provides for an oath of secrecy to be taken by its members, that "the counsel of your State, your fellows and your own, you shall truly keep secret" (section 2489). It is the duty of the foreman to swear each witness that he will not directly or indirectly divulge the fact that the jury has had the matters of which he testifies under consideration or any other fact or thing which may come to his knowledge while before the jury (section 2490). No juror is even permitted to testify as to how he or his fellows voted or what opinions he or they expressed. Nor are they, except when lawfully required, allowed to give the name of any witness before them, nor to disclose any evidence given (sections 2507-2508). The statute does not contemplate the presence of any other person than the members of the jury and the prosecuting attorney and his assistant. Indeed, the whole framework of the jury's organization and the safeguards of secrecy thrown around it and its deliberations, excludes the idea that anyone else may sit in its presence, or aid in the performance of its duties. It is a manifest impropriety (under the present condition of legislative action) for any other person to be present. The fact that it was deemed desirable to take notes of the testimony of witnesses called before the body does not justify the employment of a stenographer (whether the court stenographer or other person) for that purpose who is not a member of the jury. This is evident, not alone from the whole framework of exclusiveness and secrecy of its organization, as well as the silence of the statute in that respect, but an affirmative provision of the statute excludes the right to introduce such person into the presence of the jury for such purpose. For it is provided (section 2495) that the jury, "may appoint

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one of *their number* to be clerk thereof, to preserve minutes of their proceedings and of the evidence given before them." So strictly was the secrecy of the grand jury maintained that it was formerly held that a juror disclosing to an accused the evidence heard in the jury room made the juror an accessory to the crime charged. [4 Blackstone 126.]

But the impropriety and irregularity of introducing an unauthorized person into the presence of the grand jury does not *ipso facto* avoid the action of the jury. In order that such irregularity may avail the defendant, it must appear that he has been harmed or prejudiced thereby. [State v. Bates, 148 Ind. 610; State v. Brewster, 70 Vt. 341; U. S. v. Simmons, 46 Fed. Rep. 65; Courtney v. State, 5 Ind. App. 356.] The demurrer to the answer filed by the State admits the allegation of the answer that no prejudice resulted to defendant by the stenographer's presence, and it therefore follows that we must rule the point against the defendant.

The answer made by the State to that part of defendant's plea in abatement relating to the absence of one of the grand jurors admitted such absence, but alleged that the juror was not absent during the investigation and decision of defendant's case, nor during the deliberation thereon. That being true, it can make no difference to defendant that a juror was absent at a time when defendant and the charge against him were not under consideration. This makes it unnecessary for us to enter into a discussion of the question whether it is required that the full panel of twelve jurors be present though nine may find a true bill of indictment.

By a motion in arrest of judgment defendant brought up the question whether soliciting a bribe was an offense under the laws of Missouri. It is stated by defendant that bribery of anyone other than a judicial officer was not an offense at common law. That therefore if bribery of a legislative officer was not an offense the solicitation to be bribed, of course, could not be an

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offense, for the reason that if the solicitation produced the actual bribery no offense at common law would be committed. We however do not agree that the common-law crime of bribery could only be committed with a judicial officer. In an early day in England when the duties of judicial officers, especially of the petty sort, entered more closely into the every day life of the people than in later years, the motive for bribery was largely confined to the corruption of such officers; and bribery was perhaps largely confined to such officials. So the crime came to be defined by some of the old writers as, "where any man in judicial place takes any fee or pension, robe or livery, gift reward or brocage, of any person, that hath to do before him in any way, for doing his office, or by color of his office, but of the king only, unless it be meat and drink, and that of small value." 4 Blackstone 139, states: "Bribery is when a judge or other person concerned in the administration of justice takes any undue reward to influence his behavior in his office." But in point of fact, though the inducement to bribery was of rarer occurrence with other officers, yet the books show that the crime, at common law, could be committed with others, and that the foregoing definitions, if intended as exclusive, were much too narrow. [2 Bishop's Crim. Law, sec. 85, note 1.] Notwithstanding the definition given by Blackstone, that author further along states that bribery was an offense in other officers, punishable by fine and imprisonment; and that a statute of Henry the fourth included "other officers of the king" with judges as punishable for bribery. And so in Rex v. Vaughan, 4 Burr. 2494, it was held a crime at common law to attempt to bribe the Lord of the Treasury for the recommendation for an appointment to office. In Commonwealth v. Flagg, 135 Mass. 545, it was held to be an offense at common law to solicit the burning of a barn. And in Commonwealth v. Randolph, 146 Pa. St. 83, it was so held to solicit another to commit murder. We

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entertain no doubt that it was an offense at common law to bribe, or attempt to bribe a legislative officer. [State v. Ellis, 33 N. J. L. 102; Wharton's Criminal Law, secs. 179, 1857, 1858.]

Though we thus find it to be an offense at common law to bribe a legislative officer, the question whether it is an offense against the common law for such an officer to solicit a bribe remains to be answered. The question received full consideration by Judge Timmonds who drew up in writing his conclusions and the reasons therefor, wherein it is demonstrated to our satisfaction, that while there is no statute on the subject, yet to solicit a bribe is a misdemeanor under the common law in force in this State.

While it was a felony at common law to bribe a judicial officer, it does not appear clear whether it was a felony or a misdemeanor to bribe other officers. The distinction becomes important from the fact that it is not altogether certain that soliciting one to commit a misdemeanor is a common law offense. The books leave such question in a state of uncertainty. It has been said to bribe a legislative officer is only a misdemeanor at common law, and that to solicit the commission of a misdemeanor is not an offense; that soliciting the bribe in this case was merely soliciting the commission of a misdemeanor and was therefore not a common-law offense.

While, as we have just said, doubt has been cast on the question, yet we believe that it was a common law offense to incite or solicit another to commit a misdemeanor. The English courts have uniformly held that an attempt to commit a misdemeanor was itself a misdemeanor, and was to be punished as such. Thus, it was said that an attempt to commit an act which was a misdemeanor, whether by statute or common law, was itself a misdemeanor. [Rex v. Butler, 6 C. & P. 368; Rex v. Roderick, 7 C. & P. 795.] That any one unlawful step necessary or useful towards com-

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mitting a misdemeanor, willfully taken, is a misdemeanor. [Regina v. Chapman, 2 C. & K. 846.] So an attempt to set fire to one's own house (which, if accomplished would be a misdemeanor) was a misdemeanor. [Rex v. Scofield, Cald. 397.] And so in the celebrated case of King v. Higgins, 2 East 5, it is repeatedly stated that the attempt to commit a misdemeanor was itself a misdemeanor.

It has been at times suggested that to merely solicit the unlawful offense was not doing an act, and that the law could not notice a mere desire unaccompanied by an act. But, manifestly, soliciting is an act. It is a step in the direction of an offense. [State v. Hayes, 78 Mo. 316; King v. Higgins, supra; State v. Avery, 7 Conn. 267; 1 Bishop's Crim. Law, sec. 767.] And so it may also be said that some of the foregoing cases are for attempts to commit an offense and that they therefore do not apply to a case where there has only been a solicitation; it being contended that a solicitation is not an attempt. But it is. For the act of soliciting is an attempt to have the offense committed. Indeed, the case of King v. Higgins, supra, and several others, were cases of solicitation.

Text-writers have laid down the law that to solicit the commission of an offense was indictable, without noticing any distinction whether the offense solicited was a felony or misdemeanor. [Bishop on Crim. Law, supra; Wharton on Crim. Law, supra; 1 Russell on Crim. Law, 193, 194.] These writers look only to the character of the offense in its evil tendency and not to its technical designation. And so in a case from the Supreme Court of Illinois, much like the present save that this involves a State Senator and that an alderman in Chicago, it was held that, though there was no statute on the subject in that State, yet it was an indictable misdemeanor for an officer to propose to receive a bribe. The court said:

"According to the well-established principles of

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the common law, the proposal to receive the bribe was an act which tended to the prejudice of the community; greatly outraged public decency; was in the highest degree injurious to the public morals; was a gross breach of official duty, and must therefore be regarded as a misdemeanor, for which the party is liable to indictment. It is an offense more serious and corrupting in its tendencies than an ineffectual attempt to bribe. In the one case, the officer spurns the temptation, and maintains his purity and integrity; in the other, he manifests a depravity and dishonesty existing in himself, which, when developed by the proposal to take a bribe, if done with a corrupt intent, should be punished; and it would be a slander upon the law to suppose that such conduct can not be checked, by appropriate punishment.'' [Walsh v. The People, 65 Ill. 58.] That case had much weight with the trial judge in his consideration of the question.

We do not regard as in point the case of Hutchinson v. State, 36 Texas 293, wherein it was held that an offer of a road overseer to accept a bribe was not an offense. If the laws of that State with reference to the common law were as they are in other States we would regard the case as out of line with the overwhelming weight of authority. But by the statute of that State (chapter 1, article 3, Penal Code of Texas) only those acts are offenses which are declared to be such by the statute. The common law is thus excluded from operation.

But if we should be mistaken in the view that to solicit one to commit a misdemeanor is itself, a misdemeanor at common law, it would not affect this case. For it is certain that to solicit the commission of an offense which is a felony is a misdemeanor at common law. It can make no difference whether the offense which is solicited is made a felony by act of parliament or by the common law, it is only necessary that it be a felony, no matter how

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made so. In those jurisdictions where it prevails, the common law is a standing declaration that whoever solicits the commission of a felony is guilty of a misdemeanor. It is not a declaration that whoever solicits the commission of an offense which is a felony at any given time shall be guilty of a misdemeanor, but it is a declaration that whoever solicits the commission of an act which is a felony at the time solicited is guilty of a misdemeanor. In this State the statute makes it a felony to bribe a legislative officer. If the defendant solicited that he be bribed, he solicited the commission of a felony, and he therefore committed a common-law misdemeanor.

The cases of State v. Priestley, 74 Mo. 24, and State v. Harney, 101 Mo. 470, are not authorities in favor of defendant, nor are they opposed to the conclusions we have stated. Each of those cases was founded on indictments for an attempt to commit a rape. The facts in each were that the accused merely solicited consent to the sexual act proposed. Rape and attempt to rape, each mean an assault; and words of solicitation or persuasion do not constitute an assault. Indeed, the familiar statement in criminal law, that words do not justify an assault, shows that mere persuasion can not be construed to be an assault and without an assault there can be neither rape nor an attempt to rape. It is true that in the Harney case the person solicited was a child under twelve years, and if the act had been consummated, or attempted, her consent (by force of the statute) would not have been a defense. But yet, an act must be committed which, in the case of an older person, would constitute an *assault*. In the case of an older person there must be no consent to the act, or the attempt. In the child the law assumes there can be no consent, but, in order to constitute the offense the same acts committed against the older person without her consent

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must be committed with the child, though with her consent.

It is thus readily seen that the solicition for bribery and for sexual intercourse are in no way alike in the essentials which constitute a crime. Another distinction illustrates the lack of analogy. To solicit a bribe is to solicit a crime to be committed by the party solicited; while to solicit sexual intercourse is not to solicit the perpetration of a crime (except in States where the intercourse is made a crime). And even where the solicitation is made of the child it is not a solicitation for her to commit a crime.

It is finally argued that the evidence does not show defendant to be guilty. Under our system, the issue whether he was guilty is not triable in an appellate court. Facts are to be determined by a jury. We will pronounce upon a case in which there is no substantial evidence to sustain a verdict, but where there is evidence, its credibility and weight are exclusively for the jury under the supervision of the trial court. That court having the better opportunity for correct conclusions as to the weight of evidence, is entrusted with far larger discretion over verdicts than has an appellate court. [Reid v. Ins. Co., 58 Mo. 421; Bank v. Armstrong, 92 Mo. 265; State v. Young, 119 Mo. 525; Hunt v. Ancient Order, 105 Mo. App. 41.]

We pass then to the question whether there was any substantial evidence of defendant's guilt upon which the jury could base a verdict, and find it to be ample. The principal witness was Whitney Layton, who was interested in the manufacture of a baking powder in which alum was an ingredient. The Legislature of Missouri had enacted a law by passing a bill known as the "Pure Food Law" which prohibited the use of alum in food products. Manufacturers of baking powder who used alum in their product (Layton's company among others) were endeavoring to secure the repeal of that law at the session of the Legislature in

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1903. A repeal bill had passed the House of Representatives and was pending in the Senate, of which, as before stated, defendant was a member. Layton testified that he had met defendant at different times and had spoken to him in support of the repeal bill and asked his aid in securing its passage, when finally they met, by chance, one evening in a room back of the cloak room on the Senate side of the Capitol building. They sat down in conversation when the subject of the repeal was brought up and defendant suggested that Layton's interests needed three votes in the Senate to defeat the label substitute (which had been introduced) and to pass the repeal bill. That for the sum of $4,500 he could control two votes in addition to his own and that that would repeal the bill. That for $4,500 he could deliver the three votes necessary to pass the bill—his own and two others. Layton further testified that he did not accept the proposition; that defendant said that they would see Smith (another Senator) and go into the matter further. As they were about to leave the Capitol building Senator Smith came in and the three walked over to the hotel (the Madison House). There was a large crowd at the hotel and a ball was going on upstairs, attended by some of the members of the General Assembly with their wives, and these parties became separated without conferring together, though Layton stated that during the course of the evening he talked with Smith when the latter stated that he preferred to do whatever he did in the matter without the defendant's presence. This statement was stricken out by the court on defendant's motion.

The defendant testified in his own behalf and called in his chief support two witnesses, one of them being Senator Smith. Defendant denied meeting Layton at the Capitol building on the evening stated. He denied being acquainted with him until at the Madison House, Smith introduced them. He denied that he solicited a bribe, but said that Layton, on the evening in question,

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immediately after being introduced took him to one side and offered to bribe him for his vote with "a good round sum." That Layton said to him: "That was the way things are running in the Missouri Legislature and we have to fight the Devil with fire. I have with me sixteen votes who will stay with me until hell freezes over. I have got to have two more men and I am willing to pay fifteen hundred dollars a piece for them, and I will pay you three thousand dollars if you will get me those two votes. I have twenty-five hundred of it in my pocket now, and I can get the other five hundred by the last of the week." To this proposition he says he replied: "Well, Mr. Layton, it seems to me that if you have a meritorious bill pending before the Legislature it would not be necessary for you to buy support for it." He said that then Senator Smith came up, when Layton asked them up to his room, "to discuss the matter." He then stated that: "I started up stairs, not knowing whether Senator Smith was coming or not, but I went up to the ball room, or parlor, where my wife was and took her and came up to the Monroe House; and that was the extent of the conversation I had with Mr. Layton; it is all I had with him except to pass the time of day." That he never had a conversation with him afterwards further than to exchange greetings when they met.

Smith was under indictment for a like offense. He denied that he met defendant and Layton at the Capitol building and accompanied them to the hotel. He said that he met them at the hotel and, they not being acquainted, he introduced them. That he then stepped away and defendant and Layton entered into a conversation. That afterwards, on the same evening, at the hotel, he met Layton, who knew that he (Smith) was not friendly to the repeal of the alum law Layton wanted repealed, that they entered into conversation in which Layton told him flatly that he had tried to bribe defendant; that he had offered him fifteen hundred dol-

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lars a piece for his vote and one or two more which he needed for a majority, and that he had nearly enough money with him and could get the balance. That he asked him (Smith) to see defendant for him and see how he took the proposition; that he (Layton) was a little alarmed about it; and that he (Smith) declined to do so.

The other witness was then introduced. He stated that he first met Layton on the train between Jefferson City and St. Louis and was introduced to him. That Layton then proposed to engage him to bribe defendant. He said that Layton seemed much pleased to hear him say that he thought it unjust to discriminate against anything manufactured in this State. The witness continued in these words: "He says, 'I would like for you to help me out in this.' He says, 'I have got no big money, but I am willing to spend two or three thousand dollars for enough votes—at this time it takes about three votes.' I listened to him. He says, 'Now, you have a Senator from your county that I have never been able to have any satisfactory conversation with,' and, he says, 'he has always,' that is, Senator Sullivan, 'he has always stood—' "

Mr. Crow: "Did he say, 'from your county?' "

Witness: "No, sir; he said, 'from your country,' and he said that Senator Sullivan said he was always going to do what his people said—stand by his people, but he thought he could be purchased; and he said, 'you see what you can do with him.' After he got through with all this conversation I told him, I says, 'Mr. Layton, I have never handled any boodle or anything in my life, and I can't do it now. If I could do anything for you or your bill legitimately, I would be glad to.' So I see him several times up here and talked to him casually about it; but after I seen that they was putting up money in it I never paid any more attention; but I talked to him several times up at Jeff. City, and he said he was having a hard fight."

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It is thus apparent from the evidence of each side that the subject of bribing defendant was discussed between him and Layton. The only dispute is as to which party made the advance. The issue was a single and simple question of fact for the jury to determine. We can not say that reason and the probabilities were so overwhelmingly in favor of the testimony given by defendant and his witnesses as to destroy the testimony of the prosecuting witness. No just and fair mind could come to such conclusion. No motive was shown why Layton would make a false accusation or that he had ill will against defendant. The jury may very well have refused to credit the extraordinary story of the defense. It is certainly remarkable that a person, immediately upon his first introduction to one holding an important office, should take him to one side and without a word of encouragement, boldly offer him a large sum of money as a bribe for himself and two others holding a like office. It is strange, too, that Layton shortly afterwards, on the same evening, should voluntarily tell Smith of his effort to bribe defendant and ask him to see defendant and find out what he thought of it, and that neither defendant nor Smith should become offended. It is equally strange that Layton at his first meeting with the other witness, a stranger, should offer to engage him to bribe defendant. There are many matters of detail appearing in the testimony of these three, not necessary to comment upon, which do not add to its plausibility; suffice it to say, the jury may well have looked upon the stories as clumsy efforts to aid defendant in escaping punishment for an offense so harmful to the State and disgusting in its nature and its perpetration and so refused to credit them.

We have not discovered any legal reason for disturbing the judgment of conviction and hence order its affirmance. The other judges concur.

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WILLIAM T. GRAHAM, Appellant, v. MERCANTILE TOWN MUTUAL INSURANCE COMPANY, Respondent.

Kansas City Court of Appeals, December 19, 1904.

1. **APPELLATE PRACTICE: Abstract: Respondent's Theory.** An abstract is held sufficient to decide the case on the issues involved; and as respondent declined to go into the merits of the controversy and stands on a failure of the abstract, the appellate court can not consider his theory of the case.

2. **INSURANCE: Cash Premium: Stipulation: Note.** On a stipulation in the articles of association of a mutual company it is implied that one-half of the premium may be paid in a note of the assured.

3. **——: ——: Note: Fraud.** The fact that an insurance agent folded a note in a certain way when he handed it to the maker for his signature is, without more, insufficient to show fraud; and one signing a contract is conclusively presumed to know its contents and his failure to read does not alter the rule.

4. **——: Agent's Power: Waiver: Consideration.** An agent of an insurance company has no power to waive the consideration of a policy, unless it be specially conferred by the corporation itself.

Appeal from Ray Circuit Court.—*Hon. J. W. Alexander*, Judge.

AFFIRMED.

J. L. Farris, J. L. Farris, Jr., and *J. P. Bramaall* for appellant.

(1) A soliciting agent of town mutual insurance companies has the same power to modify or waive provisions of a contract as an agent of an "old line" company. A comparison of the following two decisions will establish proposition: Laundry v. Ins. Co., 151 Mo. 90; Ross-Langford v. Mutual Co., 97 Mo. App. 79.

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(2) A soliciting agent of an insurance company with limitations imposed on his authority by his company known to the insured may waive the conditions of the policy. Wolf v. Ins. Co., 86 Mo. App. 581. (3) Since there was substantial evidence to show the consideration of the policy was $17 in cash the court should have referred the case to the jury for the determination of the facts. (4) A town mutual insurance company may, in full payment for its policies, accept cash or part cash or part note. R. S. 1899, sec. 8089.

Reed, Yates, Mastin & Howell for respondent.

(1) The law is so well settled upon the points which we shall present that we do not deem it necessary to discuss the legal questions affecting the merits of this case. (2) The record must show the filing of a proper bill of exceptions within time. It does not do so, for which reason the case must be affirmed. Sprayer Co. v. Kolkmeyer, 91 Mo. App. 286; Jordan v. Railroad, 92 Mo. App. 81; Kampf v. Transit Co., 102 Mo. App. 314. (3) This court can not presume that the trial court was not justified in sustaining a demurrer to the evidence. Indeed, the presumption is otherwise. This court can only convict the lower court of error, in such cases, when the record presents all of the evidence and thereby makes the error appear. Deering & Co. v. Hannah, 93 Mo. App. 618; Jackson v. Railroad, 85 Mo. App. 443; Dixon v. Thomas, 91 Mo. App. 365.

BROADDUS, J.—This is a suit on a fire insurance policy issued June 15, 1900, by defendant—the Mercantile Town Mutual Insurance Company—to plaintiff insuring his house and contents against loss by fire and lightning. The property was destroyed by fire and the defendant refusing to pay the loss this suit was instituted. The case was tried before a jury which, at the

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conclusion of all the evidence, was instructed by the court to find a verdict for the defendant. In obedience to the instruction a verdict was so rendered and judgment given accordingly, from which plaintiff appealed.

The agreed premium stated in the policy was $30. One, Fred C. Comer, was the soliciting agent who took the insurance. Plaintiff's evidence tended to show that he notified said Comer before the policy was issued that he would not insure unless he could pay the entire premium in cash. Plaintiff paid $17 in cash, two dollars of which witness Comer stated was the fee for issuing the policy. At the time the policy was issued plaintiff signed a written application for insurance which by the terms of the policy was made a part thereof. The charter and by-laws of the company were also made a part of said policy. The plaintiff signed a note for $15 for one-half of said premium.

By the terms of his policy the plaintiff became a member of the defendant's association. Article 10 of the association provides that the board of directors of the association shall have the power to make an assessment as often as they deem necessary upon premium notes given by members of the company in order to settle losses and pay expenses. The company made an assessment under said article and gave notice to plaintiff of the amount assessed against him, which he failed and neglected to pay. In his reply to defendant's answer setting out plaintiff's failure to pay said assessment he denied the execution of such note and alleged that it was a forgery or that if such note existed it was procured by fraud and without his knowledge and consent.

In his testimony plaintiff admitted signing the paper but stated that it was obtained by trick: that is, by a certain manner in which it was folded when he signed it, which he illustrated to the jury. The policy, the application and the articles and by-laws of defend-

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ant were introduced in evidence. Plaintiff's abstract contains only a part of the policy and application and only section ten of the by-laws and articles of defendant's association. It nowhere appears in the parts named that one-half the premiums on policies should be paid in notes of the assured, although said Article 10 confers on defendant's board of directors the power to assess them to pay losses and expenses.

The defendant contends that as the merits of the whole case are involved, that the judgment should be affirmed because of the failure of plaintiff to include all the evidence in his abstract. We think, however, enough is shown to enable the court to decide the case upon the issues involved. The defendant's attorneys have declined to go into the merits of the controversy and are standing on the mere technicality of the failure of plaintiff to furnish a complete abstract of the evidence. Consequently, we can not avail ourselves of their theory of the case.

Said section ten of defendant's articles of association by implication authorizes defendant to accept one-half of the premium on policies in notes of the assured. But there is nothing in said section to prevent it from taking the entire premiums in cash. It was therefore competent for plaintiff to contract for a cash premium, which would have been equally as available to defendant as payment by cash and by note in the manner stated. He says that he agreed with the agent to pay a cash premium—that he told him beforehand that he would not insure in any other way. But whatever he and the agent might have said or agreed to was before the delivery of the policy which contains his contract with defendant. All such agreements, if they existed, were merged in the policy. Plaintiff accepted the policy which informed him that the premium thereon was thirty dollars. He knew this, or at least the law will hold him to such knowledge. And he admits he signed the paper purporting to be a note for $15 for one-half

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of the premium. But he says that it was obtained by fraud or trick. But he does not state that any representations were made to him by the agent of what the writing contained. He says that he did not know he was signing a note. He could read but he did not choose to do so. He states that he was deceived by the way the paper was folded. The only attempt to show fraud on the part of the agent in procuring the note was the manner in which he folded the paper when he presented it to plaintiff to sign. This unaccompanied with some deceit calculated to mislead would not amount to a fraud. "When one without fraud practiced upon him signs a contract he is conclusively presumed to know its contents and terms and his failure to read before signing does not alter the rule." [Johnston v. Life Ins. Co., 93 Mo. App. 580, and authorities cited.]

One of plaintiff's contentions is that the agent had the power to modify or waive the provisions of the contract of insurance, citing Springfield Laundry Co. v. Traders' Ins. Co., 151 Mo. 90; Ross-Langford v. Ins. Co., 97 Mo. App. 79. These cases are not in point. They refer to provisions for the non-performance of which upon the part of the assured renders the contract of insurance void. They do not go to the extent we are asked to go to here, that an agent may waive that which goes to the validity of the contract—that is, the consideration.

The argument is that it was within the powers of the agent to waive a payment of a part of the premium. This, no agent would have the right to do, however comprehensive his powers might be, unless specially conferred by the corporation itself. If such a power existed it was lodged in the directors of the company. The exercise of such a power would be to change the rate of insurance—and as all the assured were members of and constituted the association, such could be accomplished by the corporation alone, as such, and not by its executive officers.

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Plaintiff having failed after due notice to pay the assessment on his note, as provided by his contract, his policy stood suspended at the time of his loss; therefore he was not entitled to recover. Affirmed. All concur.

THE WABASH RAILROAD COMPANY, Appellant,
v. T. B. SWEET, Respondent.

Kansas City Court of Appeals, December 19, 1904.

INJUNCTION: Assessment of Damages: Notice: Jurisdiction. Where upon the trial a temporary injunction is dissolved and the plaintiff appeals and the judgment is affirmed, the circuit court has jurisdiction to assess the damages at its next term after such affirmation, on the motion of the defendant with due notice thereof to the plaintiff.

Appeal from Clay Circuit Court.—*Hon. J. W. Alexander,* Judge.

AFFIRMED.

Geo. S. Grover and *D. C. Allen* for appellant.

D. C. Allen, pro se.

(1) What is the meaning of the initial word, "upon," of section 3639, R. S. 1899? Among the meanings in the best lexicons are these: When, at the time of, on occasion of, in the sense of time; noting the time when an event came or is to come to pass. Universal Dictionary; Webster's Unabridged Dictionary; Anderson's Law Dictionary. The Queen's Bench expressly decides that the words "upon his ad-

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mission," mean at the time, and not within a reasonable time after. Regina v. Humphrey, 10 Adolphus and Ellis, 121 (Am. Ed.). (2) The judgment dissolving the injunction was rendered by the circuit court immediately after the court's opening (pursuant to its adjournment of the previous evening), at 8:30 o'clock a. m., on March 4, 1903. The court remained open for the transaction of business—and did transact business —for five or six hours thereafter, before final adjournment for the term. The railroad company transacted business in that time, taking the necessary orders for an appeal in the case. He can not plead as an excuse for not filing one that the railroad company appealed. An appeal could not cut him out of his right to his motion. The appeal, in such case, would have suspended action on the motion until the case should be finally determined. Our Supreme Court expressly so decides. Railroad v. Railroad, 135 Mo. 554. (3) The meaning of section 3639, R. S. 1899, is not that damages must be assessed *instanter,* when the injunction is dissolved, but simply that the motion to assess damages shall be made before the court, by lapse of the term, has lost the power to entertain a motion for that purpose. (4) There could in no case, after the lapse of a term or more, be a redocketing without notice. Asher v. Railroad, 81 S. W. 678; Roberts v. Land Co., 126 Mo. 470; Loehner v. Hill, 19 Mo. App. 142; Campbell v. Carroll, 35 Mo. App. 645; Neiser v. Thomas, 46 Mo. App. 50; Moore v. Bank, 58 Mo. App. 470; Hoffelman v. Franke, 96 Mo. 533; Fears v. Riley, 147 Mo. 457.

Nearing & Townsend for respondent.

(1) The court had jurisdiction to hear and determine the motion to assess damages. Neiser v. Thomas, 46 Mo. App. 47; Moore v. Bank, 58 Mo. 469. (2) Judgment should be affirmed because no motion for a new trial was filed.

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BROADDUS, J.—This case was here before on appeal—see S. W. Rep. 77, p. 123. The sole object of the suit was to enjoin defendant from prosecuting a certain action against plaintiff in the Jackson county circuit court. On March 4th, 1903, the cause was heard in the Clay circuit court on demurrer to plaintiff's petition, the demurrer was sustained, and the temporary injunction theretofore issued was dissolved. The judgment was as follows: "It is therefore ordered, adjudged and decreed by the court that the temporary injunction granted by the judge of this court on the 10th day of January, 1903, be and the same is hereby dissolved, and that the writ of injunction issued thereon be quashed; and that for want of equity therein plaintiff's petition be dismissed, and the defendant go hence without day, and recover of the plaintiff and its sureties on the injunction bond herein, viz: J. M. Allen and D. C. Allen, his costs and charges in this behalf expended, and have thereof execution." The plaintiff at the same term perfected its appeal to this court. At the October term of this court for said year the cause was affirmed. At the February term of said Clay county circuit court for the year 1904 on motion of defendant the cause was redocketed, at which term he filed his motion for assessment of his damages on the injunction bond. Notice was duly given to plaintiff of the filing of said motion. At the April term, next thereafter, the plaintiff appeared and moved to dismiss the motion on the ground that the court was without jurisdiction to try the same. The motion was overruled, damages assessed against plaintiff and its securities, whereupon plaintiff and said securities appealed.

The only question before the court is one of jurisdiction in said circuit court. The contention of plaintiff is that, defendant should have filed his motion to assess his damages at the same term when the judgment was rendered dissolving the injunction and dis-

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missing the petition, and when final judgment was rendered against defendant and his securities for costs.

Section 3639, Revised Statutes 1899, reads: "Upon the dissolution of an injunction, in whole or in part, damages shall be assessed by a jury, or if neither party require a jury, by the court," etc. It is insisted that plaintiff's appeal of the case did not cut defendant out of his right at the time to file his motion to assess damages—that the appeal would only have had the effect to suspend a hearing thereon. It has been held that where there has been an appeal from a judgment dismissing a bill and dissolving the temporary injunction, the proceedings for an injunction should be treated separately from that for damages. That is, they should be considered as independent cases. [Railroad v. Railroad, 135 Mo. 554.] In that case attention was called to Cohn v. Lehman, 93 Mo. 584, where it was expressly held that an action for damages on an injunction bond could not be maintained until a final decree had been rendered in the cause in which the bond was given, and that a judgment from which an appeal was taken without supersedeas was not final until the appeal had been disposed of. By this ruling the contrary holding in Railroad v. Burger, 32 Mo. 578, was overruled. In the first case mentioned—13 Mo. 554, supra —it was determined that, "an appeal may be taken from an order dissolving an injunction while a motion for assessment of damages on the injunction bond is pending, the effect of the appeal being to suspend the action on the motion until the determination of the appeal."

In Moore v. Bank, 58 Mo. App. 469, the court held that, "damages arising on the dissolution of an injunction must be assessed during the term at which the matter is finally disposed of in the circuit court," except in case there is an appeal from the final order of dissolution. The court cited with approval Neiser v. Thomas, 46 Mo. App. 47, where it was held: "When the

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circuit court, on the final hearing of a cause, dissolves a temporary restraining order made by it therein, and the plaintiff in the cause thereon appeals from the judgment, the motion for the assessment of damages on the injunction bond may be made by the defendant on the affirmance of the judgment by the appellate court," after due notice of the motion to the plaintiff. It was held in Hoffelmann v. Franke, 96 Mo. 533, that, "an assessment of damages caused by a temporary injunction should be made at the same term at which the dissolution of the injunction occurs;" and that, "when an injunction *pendente lite* has been dissolved on final hearing, a motion for the assessment of damages caused thereby, when made at a subsequent term and without notice to the adverse party, should be denied." But it must be remembered that there was in that case no appeal from the final judgment dissolving the injunction and dismissing the bill. It was a final disposition of the case, and there ought to be no contention that in such instances the motion to dissolve the injunction ought to be filed at the same term in which the final judgment is rendered.

From the foregoing authorities we conclude it is the law that in cases of the kind under consideration where an appeal has been taken from a final judgment dissolving the injunction and dismissing the bill the motion to assess damages on the injunction bond may be filed upon the affirmance of the judgment by the appellate court. And upon proper notice to plaintiff and his securities the defendant may have his damages assessed on the bond.

The plaintiff seems to attach much importance to the failure of defendant to give notice of his application to redocket the case and to file his motion to assess damages. It was immaterial whether the case was redocketed or not, until the motion was filed. The purpose of putting a case upon the docket is that it may be heard in its order. It has no other significance. The

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mere fact that the case was redocketed did not affect plaintiff's rights one way or the other. After proceedings, of which plaintiff and his sureties had due notice, were alone important. As defendant filed his motion to assess his damages the following term next after a final determination of the case in the appellate court, he substantially complied with the statute.

Affirmed. All concur.

HERMAN GERHART, Respondent, v. WABASH RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, December 19, 1904.

1. **PASSENGER CARRIERS: Platform: Light.** A carrier of passengers discharging them at night on a platform should have the same lighted so they can proceed with safety by the exercise of care along the usual course taken by passengers.

2. ——: ——: ——: **Special Train.** The fact that the train may be a special one or the hour of arrival unusual, can not excuse the carrier nor lessen its obligation.

3. ——: ——: ——: **Instructions.** Certain instructions are considered and approved.

Appeal from Clay Circuit Court.—*Hon. J. W. Alexander*, Judge.

AFFIRMED.

Geo. S. Grover and *D. C. Allen* for appellant.

(1) The contract, as alleged and proven, was to safely carry respondent between the termini of the route. This would include a safe and reasonably convenient mode of exit from the car to the platform. All was supplied, and all was accomplished—safe transportation, a safe and reasonably convenient mode of

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exit from the platform, a platform in first class condition, and a safe alighting thereon. Young v. Railroad, 93 Mo. App. 273; Kendrick v. Railroad, 136 Mo. 551; Ratteree v. Railroad, 81 S. W. 568; Waller v. Railroad, 83 Mo. 616; Talbot v. Railroad, 72 Mo. 294; Fillingham v. Transit Co., 102 Mo. App. 582; Hutchinson on Carriers (1 Ed.), sec. 612. All got off the car and onto the platform in safety. (2) Of the number, seventeen of them moved at once north along the platform to St. Louis avenue in safety. Two of the number—one under the protectorate of the other—with the lighting of matches and noise of many feet in front of them, walked off the platform on the east side. The twentieth man—lighting matches in the rear—lagging behind the two—escapes falling off. Would it be fair, under the same conditions, to say that Mr. Gerhart exercised the same degree of care as the eighteen men who escaped injury? If the eighteen men exercised ordinary care, can we say that Mr. Gerhart did the same? Impossible! (3) As soon as Mr. Gerhart got in safety on the platform, he made his election of courses, and, under the protectorate of Mr. Holman, the latter holding his right arm, undertook to go to St. Louis avenue. As already stated, Mr. Holman was on his right, and, therefore, in the stepping off, necessarily preceded Mr. Gerhart. Instinct will act. Especially is this so when an accident is sudden. It is impossible not to believe that under the first sensation of falling, Mr. Holman clutched Mr. Gerhart's arm and pulled him. The accident to Mr. Gerhart, therefore, could not have occurred without the preceding accident or carelessness of Mr. Holman. Mr. H's accident or carelessness can not be imputed as negligence to appellant. (4) Mr. Gerhart asked no aid of appellant's servants. He knew the route by 300 visits and Mr. Holman by 500 visits. The platform was in first class condition, and, as the photographs show, as level as a floor, perfectly adapted to ingress to and egress from cars, and as low on each side, as in common

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observation, can be paralleled anywhere. (5) Respondent's injury, therefore, can be only traced to accident, contributory negligence, or carelessness in Mr. Holman. Appellant is without fault. Hysell v. Swift & Co., 78 Mo. App. 39; Young v. Railroad, 93 Mo. App. 275; Holt v. Railroad, 84 Mo. App. 448; Assn. v. Talbot, 141 Mo. 674. (6) The circuit court clearly erred in giving respondent's instruction numbered 1 in the series asked by him. That instruction is certainly erroneous and misleading. Mansur v. Botts, 80 Mo. 651; Sheedy v. Streeter, 70 Mo. 679; Givens v. Van Studdiford, 4 Mo. App. 498; Zwisler v. Storts, 30 Mo. App. 163; Westheimer v. Giller, 84 Mo. App. 122.

Craven & Moore, Simral & Trimble for respondent.

(1) There can be no doubt, under the cases in this and other States that a railroad company owes its passengers some duty in providing them with a properly constructed and lighted station and platform, or, in other words, with a proper means of passage between its depot and the public thoroughfares, even after it has discharged its obligation as a carrier in setting the passenger down safely at his destination. Sargeant v. Railroad, 114 Mo. 348; Stafford v. Railroad, 22 Mo. App. 333. (2) Plaintiff's first instruction was proper under the facts in issue and correctly states the law of the case. (3) In conclusion, will say the judgment in this case ought to be affirmed because, under the undisputed facts in the case, it was for the right party and no complaint is made of the amount.

ELLISON, J.—Plaintiff sued the defendant for personal injuries received by him as the result of his falling off of defendant's station platform at Excelsior Springs. The judgment in the trial court was for the plaintiff.

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It appears that plaintiff and some eighteen or twenty others residing at Excelsior Springs were conveyed by defendant in a special train from that town to Richmond, Missouri, returning them to Excelsior Springs at about three o'clock a. m. the same night of their departure. The platform at defendant's station was about fourteen feet wide and three hundred feet long running north and south. The surface of the platform was smooth and well laid, but as it ran north the surface of the ground declined from it, at irregular points, from a few inches to a few feet. The platform was unlighted and unguarded by railing and the night was exceedingly dark; so much so, that even a building could not be distinguished. Plaintiff alighted safely from the car onto the platform and, in company with one of his fellows, proceeded north intending to go to the end and which would place him on one of the streets of the town. They were the last to get out of the car. In getting on with his companion as best he could they had proceeded, perhaps, half the length of the platform when they, at about the same moment, stepped off the side and fell. Plaintiff was hurt. In going along the platform they were doing the best they could in the dark. They could see the others some distance ahead of them as they struck matches to aid them along to the end. But neither plaintiff nor his campanion had matches and they were thus in total darkness. The foregoing statement is in substance the showing made by plaintiff upon which we must rely, since the verdict was in his favor. If believed, it clearly makes a case for plaintiff. It was the duty of the defendant to have its platform lighted so that passengers discharged from cars could proceed with safety in the exercise of care along the usual course taken by passengers to where they would leave the platform. [Sargent v. Railroad, 114 Mo. 348; Stafford v. Railroad, 22 Mo. App. 333.

2. A point is made that since the train was a spec-

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ial and arrived out of the usual time of trains, defendant was under no obligation to light the platform. We can not allow such contention. The defendant's obligation was in no way lessened by reason of the train being special, or the hour unusual. It undertook to transport the plaintiff to Richmond and return and to discharge him onto a platform that was reasonably safe for him to use in passing along its length for the purpose of reaching the street.

We have examined the complaint as to instructions given by the court but find them not sound. The first instruction for plaintiff seems to have required the jury to find that the platform was four feet above the ground, when the evidence in plaintiff's behalf states it to have been from three to four feet where he fell off. There is no way in which it could be reasonably said that such matter was prejudicial to defendant. Such expression was more likely to be interpreted in its favor, since a critical juror might have thought if the ground was not four feet below the platform the plaintiff could not recover.

We have examined the other points made by defendant and believe, in view of the facts being found in plaintiff's favor, that we have no authority to interfere with the result and the judgment will be affirmed. All concur.

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GEORGE DEPUY, Appellant, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Respondent.

Kansas City Court of Appeals, December 19, 1904.

1. **MASTER AND SERVANT: Iowa Fellow-Servant Law: Railroads: Moving Trains.** Under the Iowa fellow-servant statute if a railroad employee is injured by the negligence of his fellow-servant he is not entitled to recover, unless his injury was in some way connected with the movements of trains.

2. ———: **Fellow-Servants: Alter Ego: Railroads: Negligence.** Where the negligent act is done by one having authority as an *alter ego*, but relates simply to his duties as a colaborer with those under his control, the common master is not liable; and it is held that a defendant railroad was not liable for the stroke of a fellow-servant in fixing a piling cap, although he did it by the directions of the bridge boss.

3. ———: ———: ———: ———: ———. *Held*, that the defendant railroad was liable for injury resulting from a method of lowering a piling cap adopted by its bridge boss, and in adopting such method he was not the fellow-servant of the plaintiff.

4. ———: ———: ———: ———: ———. *Held*, under the facts in the case, it was for the jury to determine whether defendant furnished a reasonably safe working place for the plaintiff.

5. ———: **Assumption of Risk: Dangerous Place: Experienced Workmen.** Though the servant assume the hazard incident to his employment, yet the master is not relieved of the obligation to exercise care for his safety.

6. ———: ———: ———: ———: **Contributory Negligence.** Mere knowledge of danger in the work or the implements used will not defeat the injured servant's act, unless the danger be glaring.

7. ———: ———: **Evidence: Jury Question.** *Held*, plaintiff was entitled to go to the jury on the question of negligence, first, in regard to the method selected by the foreman for lowering the cap; and second, on the safety of the place of work.

Appeal from Daviess Circuit Court.—*Hon. J. W. Alexander*, Judge.

REVERSED AND REMANDED.

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Platt Hubbell, *George Hubbell* and *Boyd Dudley* for appellant.

(1) The servant that defendant authorized to perform these duties is a vice-principal—defendant's *alter ego*. O'Hare v. Railroad, 95 Mo. 667; Butts v. Bank, 99 Mo. App. 173; Ruth v. Transit Co., 98 Mo. App. 14; Connolly v. Ptg. Co., 166 Mo. 463; James v. Mut. R. F. L., 148 Mo. 16; Ballard v. Railroad, 51 Mo. App. 457; Grace v. Railroad, 156 Mo. 301; Creighton v. M. W. A. 90 Mo. App. 387. (2) Franklin was plaintiff's vice-principal. Foster v. Railroad, 115 Mo. 179; Tabler v. Railroad, 93 Mo. 87; Fox v. Packing Co., 96 Mo. App. 183; Glover v. Bolt & Nut Co., 153 Mo. 342; Grattis v. Railroad, 153 Mo. 407; Dayharsh v. Railroad, 103 Mo. 575; Steube v. Iron and Foundry Co., 85 Mo. App. 637; Hutson v. Railroad, 50 Mo. App. 305; Bane v. Irwin, 172 Mo. 317; Slaughter v. Railroad, 116 Mo. 277. (3) In Iowa, the authority to hire and discharge is not the test of vice-principalship. Newbury v. L. & M. Co., 100 Iowa 441, 69 N. W. 745; Foley v. Packing Co., 93 N. W. 287, 119 Iowa 246; Fink v. Ice Co., 84 Ia. 321; Baldwin v. Railroad, 75 Ia. 297, 9 Am. St. Rep. 479; Brann v. Railroad, 53 Ia. 595. (4) The fact that Franklin worked part of the time at physical labor, does not relieve the defendant of liability for his acts as vice-principal. Haworth v. Railroad, 94 Mo. App. 224. (5) Franklin negligently ordered Depuy into a dangerous place to work, and, Franklin negligently prescribed a dangerous method of performing the work. Fink v. Ice Co., 84 Ia. 321; Foley v. Packing Co., (No. 2), 93 N. W. 284 (Ia.), 119 Ia. 246; Beattie v. Bridge Works, 109 Fed. 233; Hall v. Water Co., 48 Mo. App. 356; Halliburton v. Railroad, 58 Mo. App. 27; Monahan v. Clay & Coal Co., 58 Mo. App. 68; Fogus v. Railroad, 50 Mo. App. 250; Young v. Shickle, 103 Mo. 328; Lore v. Mfg. Co., 160 Mo. 626; Kane v. The Falk Co., 93 Mo. App. 209; Hester v. Packing Co., 95 Mo.

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App. 16. (6) Defendant's negligence in the original construction of the bent proximately contributed to Depuy's injury. Ashby v. Road Co., 99 Mo. App. 186; Lore v. Mfg. Co., 160 Mo. 627; Brash v. St. Louis, 161 Mo. 438; Vogel v. West Plains, 73 Mo. App. 592; Newcomb v. Railroad, 169 Mo. 423.

M. A. Low and *Harber & Knight* for respondent.

(1) Where a contract of employment was made in one State under which the work to be done by the employee, and the work which he did in that State, and the accident happened in that State in the course of his employment, the liability of the employer will be determined by the laws of that State in a suit against the employer in another State to recover damages therefor." Fogarty v. Transfer Co., 79 S. W. 664. (2) Under the provisions of the Iowa statute, section 2071 of the supplement to the code of Iowa for the year 1902 as well as under the decisions of the Supreme Court of Iowa and as interpreted by our own courts—it is clear that any work in connection with bridges such as was engaged in by plaintiff in this case, does not come within the provisions of the statute exempting one employee from the negligence of another, but for all work not in the movement of trains—the negligence of a fellow-servant still precludes a recovery. Callahan v. Railroad, 170 Mo. 481; Williams v. Railroad, 79 S.W. 1167; Deppe v. Railroad, 36 Iowa 52; Foley v. Railroad, 64 Ia. 644; Malone v. Railroad, 65 Iowa 417; Reddington v. Railroad, 108 Ia. 96; Akeson v. Railroad, 106 Ia. 54; Conners v. Railroad, 111 Ia. 384; Meatly v. Railroad, 9 Am. & Eng. Railroad Cases (New Series), 1 and note. (3) The "dual capacity doctrine" obtains both in Iowa and Missouri. Fogarty v. Transfer Co., 79 S. W. 664. The case of Haworth v. Railroad, 94 Mo. App. 224, cited by appellant is not the law and should therefore be no longer followed. The following cases fall within the

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second class stated to-wit, where the vice-principal acted as a colaborer. Hanna v. Granger, 18 R. I. 507. 28 Atl. 559; DiMarcho v. Foundry, 18 R. I. 516, 27 Atl. 318, 38 Atl. 661; Frawley v. Sheldon, 20 R. I. 258, 38 Atl. 370; Gann v. Railroad, 101 Tenn. 380, 47 S. W. 483, 70 Am. St. Rep. 687; Ross v. Walker, 139 Pa. St. 51, el Atl. 159, 23 Am. St. Rep. 160; Railroad v. Charles, 162 U. S. 364, 16 Sup. Ct. 848, 40 L. Ed. 999; Barnicle v. Conner, 110 Iowa 240, 81 N. W. 452; Crispin v. Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; Reed v. Stockmeyer, 74 Fed. 186, 20 C. C. A. 581; Meeker v. Remington, 65 N. Y. Supp. 1116; Gall v. Beckstein, 173 Ill. 187, 50 N. E. 711; Drainage Co. v. Fitzgerald, 21 Colo. 533, 43 Pac. 210; Railroad v. Torrey, 58 Ark. 217, 24 S. W. 244; Railroad v. May, 108 Ill. 283; Clay v. Railroad, 56 Ill. App. 233; Railroad v. Massig, 50 Ill. App. 666; Railroad v. Handman, 13 Lea 423; Allen v. Goodwin, 92 Tenn. 385, 21 S. W. 760; Soutar v. Electric Co., 68 Minn. 18, 70 N. W. 796; Sayward v. Carlson, 1 Wash. 29, 23 Pac. 830; Klochinski v. Lumber Co., 93 Wis. 419, 67 N. W. 934; Holtz v. Railroad, 69 Minn. 524, 62 N. W. 805; Fertilizer Co. v. Travis, 102 Tenn. 16, 49 S. W. 832; Railroad, v. Schwabbe, 1 Tex. Civ. App. 573, 21 S. W. 706; Quinn v. Lighterage Co., 23 Blatchf. 209, 23 Fed. 363; The Miami, 93 Fed. 218, 35 C. C. A. 281; Drwyer v. Express Co., 82 Wis. 312; 52 N. W. 304; 33 Am. St. Rep. 44. The following cases fall under the first class stated, to-wit, where the vice-principal acted as such and not as a colaborer. Coal Co. v. Wombacher, 134 Ill. 57, 24 N. E. 627; Fanter v. Clark, 15 Ill. App. 470; Brick Co. v. Sobkomeak, 148 Ill. 573, 36 N. E. 572; Railroad v. Dwyer, 162 Ill. 482, 44 N. E. 815; Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876; Bridge Co. v. Walker, 170 Ill. 550, 48 N. E. 915; Offutt v. Exposition, 175 Ill. 472, 51 N. E. 651; Railroad v. Atwell, 198 Ill. 200, 64 N. E. 1095. In Norton v. Nadebok, 190 Ill. 595, 60 N. E. 843, 54 L. R. A. 842, there was a conflict in the evi-

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dence as to whether the operator of a machine was a vice-principal or a fellow-servant with a helper who worked around the machine. (4) The adoption of a plan is one thing, the negligence in carrying it out is another. The negligence alleged is the hammering down of the cap without giving the plaintiff warning or time to get therefrom. Beside, the master in this case furnished competent workmen and suitable material for scaffolding and the work in hand, and left to the workmen the manner of its construction. In such case they are all fellow-servants, and the master is not liable to one of them for the negligence, if any, of his fellow workmen, in the matter of construction. Bridge Co. v. Castelberry, 131 Fed. 181; 12 Am. and Eng. Ency. Law (2 Ed.), 956; Bowen v. Railroad, 95 Mo. 277; Livengood v. Lead & Zinc Co., 77 S. W. 1077. (5) Plaintiff either knew or had the opportunity to know every fact that defendant knew or had opportunity to know. In fact plaintiff knew every condition existing about this work that any person could know. Where the servant knows and appreciates the danger or has equal means of knowledge with the master, there can be no recovery. Fugler v. Bothe, 117 Mo. 493; Thomas v. Railroad, 109 Mo. 187; Flyn v. Bridge Co., 42 Mo. App. 529; Williams v. Railroad, 119 Mo. 316; Watson v. Coal Co., 52 Mo. App. 366; Breeden v. Mining Co., 76 S. W. 731; Livingood v. Lead & Zinc Co., 77 S. W. 1077; Grattis v. Railroad, 153 Mo. 380; Minnier v. Railroad, 167 Mo. 99; Harrington v. Railroad, 78 S. W. 662; Bradley v. Railroad, 138 Mo. 302; Berning v. Medart, 56 Mo. App. 433; Beckman v. Anheuser-Busch Co., 98 Mo. App. 555; Sinburg v. Falk Co., 98 Mo. App. 546; Holmes v. Brandenbaugh, 172 Mo. 64; Jackson v. Railroad, 104 Mo. 448; Blanton v. Dold, 109 Mo. 64; Epperson v. Cable Co., 155 Mo. 378; Roberts v. Tel. Co., 166 Mo. 379; Cordage Co. v. Miller, 126 Fed. 513; Kohn v. McNulta, 147 U. S. 241, 13 Sup. Ct. 298, 37 L. Ed. 150; Railroad v. Railroad, 122 U. S.

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194, 7 Sup. Ct. 1166, 30 L. Ed. 1114; Gibson v. Railroad, 63 N. Y. 449, 20 Am. Rep. 552; Sweeney v. Envelope Co., 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722; Buckley v. Mfg. Co., 113 N. Y. 540, 21 N. E. 717; Cole v. Sav. & Loan Society (C. C. A.), 124 Fed. 122; Brady v. Railroad, 114 Fed. 105, 52 C. C. A. 53, 57 L. R. A. 712; Railroad v. Belliwith, 83 Fed. 441, 28 C. C. A. 362; Association v. Wilson, 100 Fed. 370, 40 C. C. A. 413; Commissioners v. Clark, 94 U. S. 284, 24 L. Ed. 59; Railroad v. Bank, 123 U. S. 733, 8 Sup. Ct. 266, 31 L. Ed. 287; Railroad v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Mfg. Co. v. Inspection & Ins. Co., 60 Fed. 354, 9 C. C. A. 4; Gowen v. Harley, 56 Fed. 973, 6 C. C. A. 190; Motey v. Granite Co., 74 Fed. 157, 20 C. C. A. 368. The "scintilla" doctrine does not obtain in Missouri. Powell v. Railroad, 76 Mo. 80 and authorities there cited. (6) Where the servant has knowledge of the condition of a given piece of work or of a structure, the law will most usually infer his comprehension of the risks arising therefrom. Labatt on Master and Servant, sec. 279b, notes 1 and 3; Watson v. Coal Co., 52 Mo. App. 366; Convey v. Railroad, 86 Mo. 635; Bering v. Medart, 56 Mo. App. 443; Apple v. Railroad, 111 N. Y. 553, 19 N. E. 93; Anderson v. Clark, 155 Mass. 368, 29 N. E. 589; Scharenbroich v. St. Cloud Co., 59 Minn. 116, 60 N. W. 1093; Ragon v. Railroad, 97 Mich. 265, 56 N. W. 612; Electric Co. v. Laughlin, 45 Neb. 390, 63 N. W. 941; Yates v. Iron Co., 68 Md. 370, 16 Atl. 280; Meaney v. Oil Co., 47 Atl. (N. J. L.), 803; Ford v. Railroad, 110 Mass. 243, 14 Am. Rep. 598; Railroad v. Hughs, 119 Pa. 301, 13 Atl. 286; Anderson v. Lumber Co., 47 Minn. 128, 49 N. W. 664; Dorsey v. Phillips Co., 42 Wis. 593; Pierce v. Clavin, 27 C. C. A. 227, 53 U. S. App. 492, 82 Fed. 550; Thompson v. Railroad, 51 Neb. 527, 71 N. W. 61; Alford v. Metcalf Bros. & Co., 74 Mich. 369, 42 N. W. 52; Engine Works v. Randall, 100 Ind. 293, 50 Am. Rep. 798; Berger v. Railroad, 39 Minn. 78, 38 N.

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W. 814; Railroad v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391; Appel. v. Railroad, 111 N. Y. 550, 19 N. E. 93; Gillin v. Railroad, 93 Me. 86, 44 Atl. 361; Wood v. Locke, 147 Mass. 604, 18 N. E. 578; Mayes, Admr., v. Railroad, 63 Iowa 563, 14 N. W. 340, 19 N. W. 680; Myers v. Railroad, 95 Fed. 407, 37 C. C. A. 138; Brossman v. Railroad, 113 Pa. 496, 6 Atl. 226, 57 Am. Rep. 479; Smith v. Railroad, 42 Minn. 87, 43 N. W. 968; Devitt v. Railroad, 50 Mo. 305; Packing Co. v. Marcan, 45 C. C. A. 517, 106 Fed. 647; Kleinest v. Kunhardt, 160 Mass. 230, 35 N. E. 458; Hoard v. Mfg. Co., 177 Mass. 71, 58 N. E. 180; Mfg. Co. v. Erickson, 5 C. C. A. 343, 55 Fed. 945; Gowen v. Harley, 6 C. C. A. 197, 56 Fed. 980; Motey v. Marble & Granite Co., 74 Fed. 158, 29 C. C. A. 369; King v. Morgan, 48 C. C. A. 511, 109 Fed. 450; Smith v. Railroad, 42 Minn. 87, 43 N. W. 968; Fisk v. Railroad, 158 Mass. 238, 33 N. E. 510; Glover v. Bolt Co., 153 Mo. 327, 55 S. W. 88; Gibbons v. Navigation Co., 175 Mass. 212, 55 N. E. 987; Carpet Co. v. O'Keefe, 79 Fed. 900, 25 C. C. A. 220; Epperson v. Cable Co., 155 Mo. 378, 50 S. W. 1050; Roberts v. Tel. Co., 166 Mo. 379, 66 S. W. 155; Steinhauser v. Spraul, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441; Campbell v. Dearborn, 175 Mass. 185, 55 N. E. 1042; Barry v. Biscuit Co., 177 Mass. 452, 59 N. E. 75; Dredging Co. v. Walls, 84 Fed. 428, 28 C. C. A. 441; Hunt v. Kile, 98 Fed. 53, 38 C. C. A. 645; Ford v. Pulp Co., 172 Mass. 546, 52 N. E. 1065, 48 L. R. A. 96; Sullivan v. Electrical Co., 178 Mass. 39, 59 N. E. 645; Demers v. Marshall, 179 Mass. 12, 59 N. E. 454; Whalen v. Whitcomb, 178 Mass. 34, 59 N. E. 666; Hall v. Railroad, 178 Mass. 98, 59 N. E. 668. (7) "A preliminary question for the judge always arises at the close of the evidence before a case can be submitted to the jury. That question is, not whether or not there is any evidence, but whether or not there is any substantial evidence upon which a jury can properly render a verdict in favor of the party who

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produces it. Railroad v. Barry, 43 L. R. A. 349, 28 C. C. A. 644, 56 U. S. App. 37, 84 Fed. 944; Railroad v. Shean (Tex.), 18 S. W. 151; Powers v. Railroad, 98 N. Y. 274; Crawford v. Railroad, 127 Mich. 312; Marean v. Railroad, 167 Pa. 220, 31 Atl. 562; Nattress v. Railroad, 150 Pa. 527, 24 Atl. 753; Wojcieshowski v. Sugar Ref. Co., 177 Pa. 57, 35 Atl. 596; Railroad v. Rogers, 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. 378; Railroad v. Lemon, 83 Tex. 143; Railroad v. Drake, 53 Kan. —; Railroad v. Schweder, 47 Kan. 315; Railroad v. Barber, 5 Ohio St. 541, 67 Am. Dec. 312.

BROADDUS, J.—Plaintiff seeks to recover damages the result of an injury he received on the 9th day of September, 1902, in the State of Iowa, occasioned, as alleged, by the negligence of the defendant. It appears that plaintiff and two other persons, named Lambert and Franklin, the latter having control and supervision of workmen on bridges in the absence of the general foreman, were engaged in working on one of defendant's bridges when plaintiff was injured. On and prior to said date, defendant was engaged in the construction of a certain bridge over a deep cut on the line of its railroad. On each side of its track, what is called among bridgemen, "bents," had been constructed and caps placed thereon. Each of these bents consisted of four wooden piles about thirty-five feet long and three feet in circumference and were driven into the ground about four feet. Piling of this kind, owing to their great length, when driven into the ground are often out of line. On such occasions they are forced into line by the use of jacks and then secured by means of braces. In this instance they were forced into line and secured by what are called caps. These caps were of wood twelve by fourteen inches in diameter and sixteen feet long. Through each cap and into the top end of each pile an iron bolt, called a drift pin, was driven, the bolt penetrating the pile for a distance

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of four or five inches. Franklin discovered that one of said bents was about two and one-half inches too high and undertook to lower the same by sawing into the drift bolts, then to remove the part sawed off by the use of chisels, and then to drive down the caps to the end of the piles again. In order to accomplish the work it became necessary to erect a scaffold for the men to stand upon. This was done under Franklin's directions by attaching pieces of timber to the piles some distance below the caps, upon which timber were laid boards about two feet from and on both sides of the piles. This scaffold was about twenty-nine feet above the ground. Plaintiff and Lambert, under the directions of Franklin, did the work of sawing and chiseling, after which Franklin and Lambert got upon the cap and with a heavy iron bar proceeded, by striking it, to force it down onto the ends of the piles, Franklin standing on one end of the cap and Lambert on the other. Franklin drove the cap at his end and then handed the bar to Lambert, who in turn struck the cap, at which one of the drift pins came out on his side, which had the effect of releasing its hold, and the cap sprang back a sufficient distance to strike plaintiff who was still on the platform, and which caused him to fall to the ground, whereby he was seriously hurt. Other portions of the testimony will be alluded to in the course of the opinion.

The alleged grounds of negligence upon which plaintiff relies are that, owing to the tendency of said piling to spring out of line, they were not securely and firmly fastened after they were aligned; that the cap was not securely attached to said piles; and that the drift bolts used were crooked, too short, and insufficient to hold the cap in place; and that the bent was not provided with "sway braces." And further that, after plaintiff had finished sawing off the tops of said piles and while he was standing on said platform, and just as he was starting to get off, defendant's foreman, and

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another servant acting under his orders, carelessly and negligently struck the cap of said bent a violent blow with some heavy instrument or tool without any notice or warning to the plaintiff of the hazard to which he would thereby be subjected and without giving him time to get off said scaffold, and that the said striking of said cap made his position extra hazardous, which was well known to defendant.

Defendant in its answer admits it is a corporation and engaged in the business of a common carrier of freight and passengers. And alleges that if plaintiff was injured at the time and place mentioned it was the result of his own negligence and that of his fellow-servants, "not in any way connected with the use and operation of defendant's railway company; and that under the laws of Iowa defendant was not liable for any of the careless and negligent acts of plaintiff's fellow-servants and colaborers whilst so engaged in said work not in any way connected with the use and operation of its railway; and that the plaintiff assumed the risk usually incident to the work."

At the close of plaintiff's evidence, under the directions of the court the jury returned a verdict for defendant. Judgment was accordingly rendered and plaintiff appealed. The facts being undisputed, the court treated the case as one of law and held that plaintiff was not entitled to recover. Many questions are raised in the brief and argument of counsel, and more than one hundred authorities cited alone on defendant's side.

Under the answer it is contended that the laws of the State of Iowa govern. In Callahan v. Bridge Co., 170 Mo. 473, the court held that under the statutes of Iowa in order to render the master liable for negligence of a fellow-servant, the injury must be received "while moving a train;" and that, "the test is, was he injured in consequence of the negligence of another employee or *engineer* in moving a train?" And

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that, "the injuries must have been inflicted by the movement of a train." This court discussed, in an opinion by Judge ELLISON, the effect of said decision by the Supreme Court. [Williams v. Railroad, 79 S. W. 1167.] Therefore, it follows that if plaintiff was injured by the negligent act of Franklin while he was acting in the capacity of a fellow-servant plaintiff was not entitled to recover, as his injury was not in any way connected with the movements of defendant's trains.

Under the rulings of our courts, one having authority may act in a dual capacity. That is to say, while he directs and controls others, he is the master; but while he is engaged as a laborer with other laborers, he is a fellow-servant. The latest decision on this question is found in Fogarty v. Transfer Co., 79 S. W. 664. The question arose under a construction of the laws of Illinois where the injury occurred. And the holding is that the laws of the two States were the same, and that such was also the law of Iowa, citing Barnicle v. Conner, 110 Iowa. l. c. 240. The court quoted with approval from an Illinois case the following: "If the negligence complained of consists of some act done by one having authority which relates to his duties as a colaborer with those under his control, and which might just as readily have happened with one of them having no such authority, the common master will not be liable." And for illustration, instanced a railroad section boss who, while laboring with his men, should negligently injure one of them. While, "on the other hand, the mere fact that the servant exercising such authority sometimes, or generally, labors with others as a common hand, will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over others." And further, "when the negligent act complained of arises out of, and is the direct result of the authority conferred upon him by the master over his colaborers, the master will be

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liable." We do not believe that defendant is liable for the alleged negligent manner in which Lambert, under the direction of Franklin, struck the cap, which blow caused it to become detached from the end of the piling. There does not appear from the evidence that there was anything unusual in the stroke. It is true it was a violent one, but such was necessary to accomplish the desired purpose.

But we are of the opinion that the evidence tended to show that the method adopted by Franklin was unsafe. It will be remembered that the cap in question served to hold the piles in line, and that this cap was secured by iron spikes driven through the cap into the ends of the piles some four or five inches. After two and one-half inches had been removed, the tensile, or power, of the spike to hold was reduced at least one-half. Common experience teaches us that under such circumstances an attempt to force spikes into the end of the piles while the strain was upon them to hold them was liable to result in a mishap. And it seems to us that the evidence tends to show that such was the cause of the trouble. The act of Franklin in adopting the method he did to lower the cap on the piles was not the act of a fellow-servant but that of one in authority. Plaintiff introduced two witnesses experienced in bridge building whose testimony was to the effect that, "sway" or side braces attached to the piling would have been more safe than the method adopted. Had such braces been used, the accident, in all likelihood, would not have happened, for it is apparent that the braces would have held the piles in line and all strain would thus have been removed from the cap and it could have been lowered with safety. One of the witnesses stated that such was the proper way in which the work should have been performed. With such evidence, it was a question of fact for the jury to determine, under proper instruction, not whether defendant should have adopted the safest

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method for the undertaking, but whether in fact it adopted the one reasonably safe. We can conceive of but two ways which the defendant should have adopted in order to have readily and economically done the work, viz; the one it did adopt, and the other by securing the piling by independent braces. And if the former was not reasonably safe it was its duty to adopt the safest, as it was the only other course to be pursued.

It was a question also for the jury to determine whether the place where plaintiff was working under the circumstances was reasonably safe. It is well settled law that the master is required as a general rule to furnish his servant with a reasonably safe place in which to work. [Nicholds v. Glass Co., 126 Mo. 55; Porter v. Railroad, 71 Mo. 71; Bowen v. Railroad, 95 Mo. 276; and Foley v. Packing Co., 119 Iowa 246.]

But defendant contends that as plaintiff's employment was shown to have been dangerous, he assumed the risks. If the danger that plaintiff encountered was such as was ordinarily connected with his work, he can not recover; for by his contract of employment he assumed such risks. This is well-settled law. [Fugler v. Bothe, 117 Mo. 475; Thomas v. Railroad, 109 Mo. 187. But his assumption of the usual and ordinary risks attendant upon his employment did not relieve the defendant of the obligation to exercise reasonable care for his safety.

It is claimed that the plaintiff, being an experienced carpenter and having performed similar work, was aware of the danger he was incurring, which precluded his right to recover. The mere fact that plaintiff was aware of the fact that the piling was not securely aligned would not charge him with the assumption of the risk nor of contributory negligence. The question is, did he know, or ought he have known, in the exercise of ordinary care, the risks and not merely the defects that existed? [Doyle v. Trust Co., 140 Mo. 1.]

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And, "mere knowledge of danger in working with a defective instrumentality will not defeat the servant's action unless the danger be so glaring as to threaten immediate danger." [Devore v. Railroad, 86 Mo. App. 429; Flynn v. Railroad, 78 Mo. 196.] Notwithstanding the plaintiff was engaged in dangerous work, yet the master must exercise reasonable care to secure his safety while so engaged. And such is the holding of all authorities. [Bradley v. Railroad, 138 Mo. 293; Reed v. Railroad, 94 Mo. App. 371.]

Whether or not it was the duty of Franklin to notify plaintiff that he would be in danger on the scaffold while he—Franklin—and Lambert were lowering the cap to the piling, is immaterial. Defendant's liability would depend upon whether the scaffold was a reasonably safe place. If it was, Franklin was not required to give such notice. If it was not, defendant was liable in the first instance; and Franklin's failure to give warning of the danger would not enhance its liability. By so doing the injury perhaps would have been averted, but as there was no pretense that it was so given the matter is unimportant. We believe plaintiff was entitled to go to the jury on two questions, viz.:

First, was the defendant guilty of negligence which resulted in plaintiff's injury by reason of the method selected by its foreman in lowering said cap?

Second, was defendant chargeable with negligence for failure to provide plaintiff a safe place in which to do his work?

Both these were questions of law and fact which plaintiff had a right to submit to the jury. For the reason given the cause is reversed and remanded. All concur.

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CITY OF ST. JOSEPH, Respondent, v. METROPOLITAN LIFE INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, December 19, 1904.

MUNICIPAL CORPORATIONS: Occupation Tax: Repeal: Statutory Construction. Section 5508, Revised Statutes 1899, has not been repealed by section 8043, and cities of the second class may levy and collect a tax against insurance agents.

Appeal from Buchanan Criminal Court.—*Hon. Benj. J. Casteel,* Judge.

AFFIRMED.

R. L. Spencer, Nathan Frank, Richard A. Jones and *Max W. Oliver* for appellant.

(1) The license fee of $50 imposed by section 1, chapter 40 of the laws of the city of St. Joseph for the non-payment of which judgment appealed from was entered, is of such amount and levied under such conditions that it is manifestly not simply a charge made for the purpose of defraying the expense of enforcing a police regulation, but is a tax for the purpose of providing revenue. Lamar v. Adams, 90 Mo. App. 40; St. Louis v. Spiegel, 75 Mo. 145; Kansas City v. Grush, 151 Mo. 128; Ward v. Maryland, 12 Wall. 418; Tel. Co. v. Medford, 115 Fed. 202. (2) Being a tax, the ordinance of the city of St. Joseph providing for the levy and collection of this license fee is in conflict with the general law of the State (art. 8, chap. 119) enacted in 1895 in so far as it can be held to apply to foreign insurance companies, and so of non-effect as to them, for this act expressly provides that the two

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per cent per annum on all premiums which all foreign companies are obliged to pay the State irrespective of the net amount collected less loss by return of premiums or under the policies shall be in lieu of all other taxes. Its language is not limited in its scope to State taxes, nor are those levied by the various municipal subdivisions of the State excluded from its effect. R. S. 1899, sec. 8043. (3) The city of St. Joseph is a municipal corporation and is not authorized to levy or collect taxes of any kind, or for any purpose without express authority from the General Assembly. Ruggles v. Collier, 43 Mo. 353; State v. Shortridge, 56 Mo. 126; Grading Co. v. Holden, 107 Mo. 305; State ex rel. v. Mason, 153 Mo. 23; R. S. 1899, sec. 5508, pp. 1275, 1276 and division 17, p. 1278. (4) The exercise of the right of taxation by the city of St. Joseph in so far as it is sought to be applied to foreign insurance companies is inconsistent with the provisions of section 8043, Revised Statutes 1899, before referred to.

Allen & Mayer for respondent.

(1) Respondent's charter gave it the power to license, tax and regulate insurance companies doing business within the city. R. S. 1899, sec. 5508. (2) Unless section 5508, Revised Statutes 1899, has been repealed, it makes no difference whether the ordinance in question imposes the license for revenue or as a police regulation; the city had the power to license for revenue the occupation of insurance. The same ordinance now in question was, prior to the enactment of section 8043, Revised Statutes 1899, held legal and valid by the Supreme Court. St. Joseph v. Ernst, 95 Mo. 360. (3) The ordinance was not rendered invalid by the enactment of section 8043, Revised Statutes 1899; or, in other words, section 8043, Revised Statutes 1899, did not repeal section 5508, Revised Statutes 1899. Lamar v. Adams, 90 Mo. App. 35.

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BROADDUS, J.—This case was taken by appeal from the judgment of the Buchanan criminal court to the Supreme Court and from thence to this, as that court had no jurisdiction. The plaintiff is a city of the second class and had in force an ordinance which reads as follows:

"No person or association, or companies of persons or corporation, shall carry on in this city, in person or by agent, the business of any kind of insurance without a license for that purpose, and the charge for such license shall be fifty dollars per year, and no license shall be issued for a shorter period than one year. Said license shall permit the insurance company securing the same to establish but one agency in said city on said license. Any person, or association or company of persons, or corporation, desiring to have more than one agency in this city, shall be required to take out a separate license for each agency, and the charge for such license for each additional agency shall be fifty dollars per year. Nothing in this section shall be so construed as to relieve any person acting as agent for such companies from the payment of a license as insurance agent."

The defendant carried on the business of insurance in plaintiff city without paying the license fee and taking out a license as required by said ordinance, whereupon proceedings were instituted against it in the police court of the city. The case was appealed to the criminal court where defendant demurred to the information, which demurrer was overruled. Judgment was rendered for plaintiff for $50, from which defendant appealed to the Supreme Court.

The right of plaintiff to impose said license tax on insurance companies was authorized by section 5508, Revised Statutes 1899. It is claimed by defendant that this section was repealed by implication by section 8043, idem, and that therefore the said ordinance ceased to

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have any vitality. The question arose in the case of the City of Lamar v. Adams, 90 Mo. App. 35, where this court held that section 5508, Revised Statutes, giving to cities of the fourth class the power to tax occupations for revenue was not in conflict with, nor repealed by said section 8043. As section 5508 applies to cities of both the second and fourth class, the case cited is decisive of this. The questions raised in the two cases are similar in every respect.

The cause is affirmed. All concur.

THE CITY OF ST. JOSEPH to the use of PETER SWENSON, Defendant in Error, v. ZEILDA FORSEE, Plaintiff in Error.

Kansas City Court of Appeals, December 19, 1904.

1. **TAXBILL: Owner: Omission of Name.** A taxbill should be issued against the record owner of the property to be charged; but omitting to name such owner in the bill will not render it invalid.

2. ———: ———: **Suit: Notice.** The holder of a taxbill has a right to assume that the record owner is the true owner and to sue accordingly; and a sale under such judgment carries the title against the grantee in an unrecorded deed, provided the purchaser has no notice of such deed.

3. ———: ———: ———: **Prima Facie Case.** Anyone having an interest in the property sought to be charged may be made a party defendant, but the taxbill is not prima facie evidence against one not named therein; and a plaintiff must make out his case against such party *aliunde*.

Error to Buchanan Circuit Court.—*Hon. A. M. Woodson*, Judge.

REVERSED AND REMANDED.

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James F. Pitt for plaintiff in error.

(1) The chief question presented by this record involves the validity of a sewer bill, issued against and in the name of a dead person, whom the officer knew to be dead, and while he in fact knew who was the owner of the property described in it. R. S. 1899, sec. 5686. (2) Is this statute mandatory, or merely directory? If mandatory, then a taxbill made out, as in this case, against a dead person, whom the engineer knew to be dead, and who by no possibility could be the owner, is absolutely void, and not amendable. In such circumstances the officer makes no mistake, to be corrected or amended; he willfully fails or refuses to obey the law, and his act is a nullity. Sedalia v. Gallie, 49 Mo. App. 397; Westport v. Mastin, 62 Mo. App. 657; State ex rel. v. Gibson, 12 Mo. App. 1; Kefferstein v. Knox, 56 Mo. 186; Vance v. Corrigan, 78 Mo. 97; Jaicks v. Sullivan, 128 Mo. 177; St. Louis v. Wenneker, 145 Mo. 239.

Graham & Fulkerson for defendant in error.

(1) The judgment is for the right party. The taxbill was made out "in the name of the owner" within the meaning of the statute. R. S. 1899, sec. 5686; Vance v. Corrigan, 78 Mo. 94; Payne v. Lott, 90 Mo. 676; Nolan v. Taylor, 131 Mo. 227; Elliott on Roads and Streets (2 Ed.), sec. 598; Reed v. Kalfsbeck, 147 Ind. 148; Trust Co. v. Chehalis Co., 79 Fed. 282. (2) At most the statute is but directory and not mandatory. St. Louis to use of Rotchford v. DeNoue, 44 Mo. 136.

BROADDUS, J.—This is a suit upon a taxbill issued against Amanda Corby as the owner of the property sought to be charged with the lien for work done by Peter Swenson in the construction of a sewer in the city of St. Joseph, Missouri. At the time the contract for the work was let the title to the property in

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question—as it appeared by the records—was in said Amanda Corby, but the fact was that she had died previously thereto and the same had descended to the defendant who was her sole heir at law.

On the trial the taxbill was introduced in evidence over the objections of the defendant. The ground of objection was that the taxbill should have been made out against the owner of the property. The defendant had set up in her answer that when said taxbill was issued the engineer who issued it, as well as plaintiff Swenson, knew that the title to the property was in the defendant. This answer was not controverted by any reply and thereby stood confessed. The plaintiff contends that the case was tried upon the theory that said allegation was traversed but the record of the trial does not so show.

Section 5686, Revised Statutes 1899, governing cases of this kind requires that taxbills of the nature of that in controversy should state the name of the owner of the property. The courts hold that the owner mentioned in this section is that person whom the public records show to be vested with the title, in the absence of knowledge to the contrary. [Smith v. Barrett, 41 Mo. App. 460; Vance v. Corrigan, 78 Mo. 94; Cowell v. Gray, 85 Mo. 169; Payne v. Lott, 90 Mo. 676 and Crane v. Dameron, 98 Mo. 567.] Yet, it is equally as well-settled law that an omission to state in a taxbill the owner of the property sought to be charged with a lien does not render it invalid. [City of St. Louis ex rel. v. DeNoue, 44 Mo. 136; Stadler v. Roth, 59 Mo. 400; Vieths v. Planet P. & F. Co., 64 Mo. App. 207.] It follows therefore that notwithstanding the said taxbill was not made out against the known owner of the property, the same was not invalid.

The statute requires that a suit to enforce such taxbills shall be brought against the owner of the property to be charged; and in the absence of knowledge or

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notice to the contrary, the holder of the bill has the right to assume that the person in whom the records show the title to be vested is the true owner, and to sue accordingly; and that a sale under execution upon a judgment against the record owner passes the title as against the grantee in an unrecorded deed from him, provided the purchaser had no notice of the unrecorded deed. [Vance v. Corrigan, 78 Mo. 94; Payne v. Lott, 90 Mo. 676; Crane v. Dameron, 98 Mo. 567.]

It is also the law that any party may be sued to enforce the lien of a taxbill against any person who has an interest in the property sought to be charged, but the taxbill is not prima facie evidence of liability against a person so sued who is not stated in such taxbill to be the owner of such property. [Vieths v. Planet P. & F. Co., supra, and Construction Co. v. Loevy, 64 Mo. App. 430. It therefore follows that regardless of its theoretical value, it was a matter of no consequence at the time the engineer issued the taxbill whether or not the defendant not named was the owner of the property. Although sued, the said taxbill as to her was not prima facie evidence of liability. As the court held that it was such prima facie evidence the cause must be reversed for that error. But the suit was properly brought under the statute and the plaintiff will be required to prove his case *aliunde* said taxbill in the usual manner. Reversed and remanded. All concur.

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DAVID H. BOND, Respondent, v. THE CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, December 19, 1904.

1. **PASSENGER CARRIERS: Alighting from Train: Demurrer to Evidence: Jury.** Though the preponderance of the evidence relating to the alighting from a moving train be largely with the defendant, yet the court can not give a peremptory instruction if there is substantial evidence supporting plaintiff's theory of the case, and this though the plaintiff may have contradicted himself in his testimony on the issue, since it is for the jury to say which of the two statements they will believe.

2. ———: ———: **Jury Question: Negligence.** It is not negligence *per se* for a passenger to attempt to board or alight from a slowly moving car; and whether, under the circumstances of the given case, it is negligence is for the jury.

3. ———: ———: **Pleading: Variance: Instruction.** A petition counted on the negligence of the defendant in suddenly starting its train while plaintiff was in the act of alighting therefrom. An instruction that if he attempted to alight from a slowly moving train he could not recover should have been given.

4. ———: ———: **Verdict: Passion and Prejudice: Appellate Practice.** The appellate court will not set aside a verdict unless it is so clearly against the weight of the evidence that it must have been the result of passion and prejudice, though the trial court may in its discretion set aside a verdict when it believes the jury has abused its discretion in passing on the credibility of the witnesses and the weight of the evidence.

Appeal from Clinton Circuit Court.—*Hon. A. D. Burnes*, Judge.

REVERSED AND REMANDED.

O. M. Spencer, F. B. Ellis and *Wm. Henry* for appellant.

(1) One entering a train as an escort for a female taking passage thereon is not deemed a passenger, and

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is entitled to no time to get on or off, except that afforded in performing the company's duty to its passangers, unless the company has notice of the fact that he enters on the train as a mere escort, and even in that case ordinary care and diligence is the degree of care due such person, and not the high degree of care due to passengers. Doss v. Railroad, 59 Mo. 27; Yarnell v. Railroad, 113 Mo. 570. (2) For a person to get on or off of a train of cars propelled by steam at any place while moving, in disregard of the protest or warning of those in charge of the train, is to assume the risk of the act, and the recklessness or negligence implied by law will preclude a recovery. Fulks v. Railroad, 111 Mo. 343; Neville v. Railroad, 158 Mo. 315. (3) Previous to the last named case it had been held by our Supreme Court that in the absence of warning or protest it was not negligence *per se* for a passenger to get on or off of a moving train at a proper place at a station, provided the motion was slow, that is, so slight as to be almost or quite imperceptible. Clotworthy v. Railroad, 80 Mo. 223; Price v. Railroad, 72 Mo. 418; Straus v. Railroad, 75 Mo. 190; Nelson v. Railroad, 68 Mo. 595; Doss v. Railroad, 59 Mo. 38; Fulks v. Railroad, 111 Mo. 335; Kelley v. Railroad, 70 Mo. 608. (4) It is not negligence *per se* for a passenger to get on or off of a moving train, if urged or directed to do so by those in charge of the train, even though the motion is not slight, or so slow as to be almost imperceptible, but somewhat rapid. Wyatt v. Railroad, 55 Mo. 491; Taylor v. Railroad, 26 Mo. App. 236. (5) It is a long and well-established doctrine that an appellate court will interfere in case a verdict of a jury is so clearly against the evidence, or the weight of it, that it must have been the result of passion or prejudice. Hipsley v. Railroad, 88 Mo. 348; Caruth v. Richardson, 96 Mo. 186; Spohn v. Railroad, 87 Mo. 74; Cooper v. Hunt, 103 Mo. App. 9. (6) The peremptory instruction to find for defendant on the case made by

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the evidence and pleadings should have been given. Neville v. Railroad, 158 Mo. 293; Fulks v. Railroad, 111 Mo. 343; Heaton v. Railroad, 65 Mo. App. 479. (7) What plaintiff admitted in his deposition must be taken as true for the purposes of this case, and instruction number 1 for him ought to have been refused, and instruction "G" for defendant given. Erwin v. Railroad, 94 Mo. App. 297; Feary v. Railroad, 162 Mo. 105. (8) Instruction "H" prayed by defendant should have been given. Murphy v. Railroad, 43 Mo. App. 342; Heaton v. Railroad, 65 Mo. App. 479; 112 N. Y. 371; 8 Colo. 163; 116 Mass. 269. (1) The peremptory instruction to find for defendant was properly refused. We submit that under the evidence the plaintiff was entitled to have the issues submitted to a jury. James v. Life Assn., 148 Mo. 16; Bruman v. Santa Fe, 72 Mo. App. 107; Tower v. Pauley, 76 Mo. App. 287; Reed v. Railroad, 94 Mo. App. 371; Dorsey v. Railroad, 83 Mo. App. 528; Hopkins v. M. W. of A., 94 Mo. App. 402; and cases cited; Saxton v. Railroad, 98 Mo. App. 499. (2) Instructions "C" and "F" were properly refused. They are not correct statements of the law. Fulks v. Railroad, 111 Mo. 335; Schaefer v. Railroad, 128 Mo. 64; Dawson v. Transit Co., 102 Mo. App. 277; Eikenberry v. Transit Co., 103 Mo. App. 442. (3) Instruction "H" offered by defendant was properly refused, for the following reasons: It was not based on the evidence. Defendant's witnesses testified as to speed of train and three said "about six miles per hour." It is not a correct proposition of law, and especially not under the evidence in this case. Appellant cites cases of Murphy v. Railroad, 43 Mo. App. 432 and Heaton v. Railroad, 65 Mo. App. 479. The Murphy case is not in harmony with the decisions of this court, nor of the Supreme Court. Eikenberry v. Transit Co., supra; Owens v. Railroad, 111 Mo. 335. (4) The appellate courts will not interfere in this regard unless there is a clear case of abuse of this dis-

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cretion by the trial court. State v. Jacobs, 152 Mo. 565; Kuenzel v. Stevens, 155 Mo. 280.

BROADDUS, J.—This is a suit to recover damages for personal injuries received by plaintiff in alighting from a passenger train of defendant at its depot in Lathrop, Missouri, on the fourth day of October, 1902. Plaintiff was a man sixty-four years of age, a farmer and as such a laborer; his married daughter, who lived in St. Louis and who had been visiting him at his farm, was returning to her own home and he and another daughter accompanied her to said depot. Upon the arrival of the train upon which said married daughter proposed to embark on her journey she and plaintiff entered a passenger coach, he carrying her valise and a box which he deposited in a seat some distance from the front end of the coach. The coach door was closed after plaintiff's entrance. In his effort to get off the train plaintiff fell and was injured.

Thus far the facts are practically admitted. Plaintiff's evidence tends to show that his said married daughter, a Mrs. Shanks, had been sick and was at the time quite feeble and that plaintiff entered the coach for the purpose of assisting her with her baggage. Plaintiff proceeded first with his daughter, Mrs. Shanks, following him. When at the entrance, defendant's brakeman said to plaintiff with reference to her baggage, "Take them in for her, you have plenty of time." To which plaintiff replied that he was not going himself but was just helping his daughter on. Plaintiff hurried into the coach with Mrs. Shanks' baggage and then hurried out, Mrs. Shanks coming in the door as he was going out. He went down the steps and as he was in the act of alighting from the train it moved forward with a sudden jerk which caused him to fall upon the platform of the station. That while the train was at the station the brakeman stood at the front door of the rear car and the conductor stood about midway

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of the baggage car. While plaintiff was inside the chair car the brakeman said to the conductor, "all right here" and the conductor gave the engineer the signal to go, and the train started up immediately.

It was shown that plaintiff was unable by reason of physical disability to be present at the trial and his evidence was by way of deposition.

The defendant's evidence conflicts with that of plaintiff except as to certain matters already stated which are not in dispute. It went to show that plaintiff was dilatory in leaving the coach and had some difficulty in getting the door open and that when he attempted to alight the train was going at a rate of speed equal to four, five or six miles an hour. And the brakeman denied that he used the language attributed to him or that he knew that plaintiff was not aiming to take passage on the train. Defendant's station agent also testified that the train was moving at a rapid rate of speed and that he warned plaintiff not to get off, but that notwithstanding such warning he let go the hold he had with his right hand of the railing on his right, while at the same time he turned his face to the rear of the train, holding the rail with his left hand, leaped off and fell upon the station platform.

After plaintiff's deposition was taken to be read in his own behalf the defendant also had it taken, and both were read on the trial. In the latter plaintiff testifies that as he went to step off the train was moving. There was testimony of other witnesses, however, to the effect that plaintiff was thrown from the steps of the coach by a sudden jerk and that he did not step off while the train was moving. Two witnesses testified that plaintiff told them that he jumped off the train. One of them to the effect that plaintiff said he had thought about jumping before he did so and that he thought if he jumped the way he did it would lessen his fall. And there was also evidence to the effect that the train had moved more than one car length from

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the point of starting before plaintiff fell upon the station platform.

The trial resulted in a verdict and judgment for plaintiff for $2,000 from which defendant appealed.

It is insisted that the court, under the evidence, erred in refusing to instruct the jury to find for the defendant. This insistence is predicated upon the theory that plaintiff was not thrown from the steps of the car by the sudden starting of the train, but that he fell when attempting to alight while it was moving at a rapid and dangerous rate of speed. As the evidence was contradictory upon this issue—the controlling issue in the case—we do not see how the court could have assumed to have directed a finding for defendant without usurping the province of the jury. It is true, the evidence preponderates in favor of defendant's contention that plaintiff stepped from the train while it was in motion and going at the rate of from four to six miles an hour. But a preponderance of evidence alone will not authorize this court to say that the peremptory instructions should have been given. There was substantial testimony that plaintiff was thrown from the coach by the sudden movement of the train.

Defendant in its argument assumes that the facts overwhelmingly established that the train was running at a speed of six or more miles an hour when plaintiff attempted to get off; that plaintiff admitted that the train was moving at some speed; and that he was warned not to get off as the train was moving. As has been already stated, the preponderance of the evidence was in defendant's favor, but it was denied by plaintiff that he was warned not to get off. And the statement of plaintiff in his last deposition that the train was moving at the time did not authorize the court to take such statement as conclusive against him, notwithstanding his former statement that he was thrown by a sudden jerk of the car. It was a question for the jury to say which of the two they believed.

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[Ephland v. Railroad, 71 Mo. App. 597; 57 Mo. App. 162.]

The evidence was conflicting upon each of defendant's assumed facts and it is settled law that the court will not reverse a cause when the finding of the jury is supported by any substantial evidence, notwithstanding the preponderance of the evidence was greatly against such finding.

The petition is based upon the negligence of defendant's employees who are charged with the knowledge that plaintiff entered the train not as a passenger but for the purpose of assisting his daughter, who was such passenger, with her baggage; and that they knowingly authorized him to so enter, and that after he rendered such assistance, while attempting to get off, and before he could do so, they suddenly started said train, which had the effect to throw him upon the station platform, whereby he was greatly injured. The defendant by its answer put in issue the allegations of the petition, and further alleged contributory negligence in that the plaintiff attempted to alight from the train in an improper manner while it was moving at a rapid rate of speed. And upon the issues thus raised it asked instructions C and H which the court refused. The first was to the effect that notwithstanding defendant's employees in charge of the train knew that plaintiff was not a passenger, and that they did not hold such train long enough to allow him a reasonable length of time to get off, yet if the train was in motion before he attempted to alight, he was not entitled to recover. The latter was to the effect that if the train was running at a rate of speed equal to six miles per hour, he was not entitled to recover. In Fulks v. Railroad, 111 Mo. 335, the court held: "It was not negligence as a matter of law for a passenger to attempt to get on a slowly moving train, especially at a platform." And such was the holding in Schaefer v. Railroad, 128 Mo. 64. In Eikenberry v. Railroad, 103 Mo. App. 442, it

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was held: "It is not negligence *per se* for a man of ordinary activity, thirty-eight years of age, to attempt to board a street car while turning a curve at the rate of five or six miles an hour." A similar ruling was made in a street car case in Dawson v. Transit Co., 102 Mo. App. 277. And if the train was "moving so slightly as to be almost imperceptible," it is a question for the jury to say whether it was such negligence as would preclude a recovery. [Clotworthy v. Railroad, 80 Mo. l. c. 220; Straus v. Railroad, 75 Mo. 185; Swigert v. Railroad, 75 Mo. l. c. 475.] In a later case, however, that of Neville v. Railroad, 158 Mo. l. c. 316, the opinion of the court seems to hold that, if the passenger was in the act of getting off and the train was *moving very slowly* he could not recover, for he took the risk of getting off a moving train without the direction or invitation of defendant's servants. But in the still later case of Peck v. Transit Co., 178 Mo. l. c. 627, the court held as formerly, "that it was not negligence *per se* for a passenger to attempt to board a car, or alight from it, while it is moving slowly; that whether under the circumstances of the given case it is negligence so to do, is a question for the jury.

But the plaintiff is not seeking to recover for injuries received while attempting to alight from a slowly moving train, but for the negligence of defendant in suddenly starting its train while he was in the act of alighting therefrom. Therefore, if it should appear that he attempted to get off the train while it was moving even slowly he was not entitled to recover. He must recover upon the cause of action as alleged which is that the car was not in motion when he attempted to alight, but it was suddenly started with a jerk that threw him off and caused his injury. The defendant seems to have adopted two different theories in asking said instructions C and H, viz.: One, that if the train was moving slowly, and the other, that if it was moving rapidly at the time plaintiff attempted to alight, he

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ought not to recover. The refusal of the court to give the latter worked no prejudice if the former should have been given, which we hold under the issues it should have been. [Peck v. Transit Co., supra.]

It is urged that the verdict of the jury is so clearly against the evidence and the weight of the evidence that it must have been the result of passion or prejudice. In Chitty v. Railroad, 148 Mo. 64, the verdict on its face appeared excessive. It was therefore held to be the result of prejudice or passion. For a similar reason the cause was reversed in Kennedy v. Transit Co., 103 Mo. App. 1. "Where the right of juries to pass upon the credibility of witnesses and the weight of the evidence is abused by them in arbitrarily disregarding the uncontroverted evidence of witnesses, disinterested and unimpeached either by their manner of testifying or otherwise, the correction is to be found in the right of the *nisi prius* judge to set aside the verdict on proper motion and take the verdict of another jury, or by the action of this court wherever it appears in a case that the action of the jury is so clearly against the weight of evidence that it must have been the result of passion or prejudice." [Hipsley v. Railroad, 88 Mo. 348.] And in Caruth v. Richeson, 96 Mo. 186, the court said: "This court rarely interferes with the verdict of a jury where there is any substantial evidence to support it, though the trial court has a large discretion in the matter. But in extreme cases this court must and will interfere and that, too, whether the verdict be for plaintiff or defendant." And that, "while different language is used in these cases in the statement of the rule, it is safe to say that this court will in no case interfere with the verdict for defendant on the ground that it is against the evidence unless it appears to our satisfaction that the verdict was the result of corruption, prejudice or passion."

There is no complaint here that the verdict is excessive, nor does it appear that the jury disregarded

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the evidence of uncontradicted, although impeached witnesses. The case, in our opinion, does not fall within the rule.

Reversed and remanded. All concur.

O. H. STEVENS et al., Appellants, v. JOSEPH H. LARWILL, Administrator, etc., Respondent.

Kansas City Court of Appeals, December 19, 1904.

1. **ADMINISTRATION: Revocation of Letters: Jury: Constitution.** The proceeding to revoke the letters of an administrator is equitable in its nature and the parties are not entitled to a jury either under the statute or the Constitution.

2. ———: **Partition: Jurisdiction: Will.** Under section 4383, Revised Statutes 1899, providing that no partition of lands devised by a last will shall be made contrary to the instruction of the testator, the bringing of an action in partition in the circuit court by heirs who are disinherited by the will can not oust the probate court of jurisdiction to proceed with the administration of the estate, although it may be largely real estate.

3. ———: ———: ———: **Personal Assets: Debts.** Where there are debts due by the testator and he has personal assets to be collected, the fact that the probate court has ordered into the hands of the administrator the real estate constitutes no ground for the revocation of the administrator's letters, and a partition suit in the circuit court will not oust the probate court of its jurisdiction as to personal property.

4. ———: **Grant of Letters: Citation: Will.** Where persons named in the will as executors are disqualified to act, letters of administration should be granted to the persons entitled thereto but for the will; and where such persons are non-residents and therefore disqualified, no notice is necessary and the probate court may determine ex parte to whom the letters should be granted.

5. ———: ———: **Non-Resident: Domicile.** Evidence relating to the domicile of an administrator is considered and it is held that he was a resident of the State of Missouri within the mean-

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ing of the administration law, although he came to the State after the death of the testator and took up a residence with the view of becoming the administrator in this State. Authorities distinguished.

6. ———: **Officers: Domicile.** An administrator is not a public officer and is not required to reside in this State one year next preceding his appointment, but it is sufficient if he be domiciled in the State at the time of his appointment.

7. ———: **Will: Foreign Executor.** A non-resident executor of a will is not authorized to act in this State in the collection of assets or the payment of debts of the testator.

8. ———: **Foreign Executor: Ancillary Administrator.** The fact that an estate is in process of administration in another State where the testator resided at his death will not interfere with an ancillary administration in this State, as the statute requires the domestic administrator after paying such debts in this State to transmit to the foreign executor the remainder of the estate.

9. ———: **Will: Contest: Partition: Collateral Attack.** A suit in partition can not become a contest of a will since a probated will can be only attacked in the manner prescribed in the statute and can not be assailed in a collateral proceeding.

10. ———: **Revocation of Letters: Hostility to Heirs: Evidence.** Though the evidence shows the administrator sued one of the partitioners for rent due the estate, yet, it is held not to show such hostility as to prevent a proper management and husbanding of the estate.

11. ———: ———: **Taking Charge of Real Estate: Collateral Matters.** Where the issue is whether or not the letters of administration should be revoked, the validity or invalidity of orders relating to the real estate and other collateral matters are immaterial.

12. ———: ———: **Hostility of Administrator: Evidence.** On the question of an administrator's hostility to the heirs seeking the revocation of his letters, a witness should state facts and not opinions; and in this case if the excluded evidence had been admitted, yet, it would be wholly insufficient to sustain the action.

Appeal from Jackson Circuit Court.—*Hon. James Gibson,* Judge.

AFFIRMED.

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Frank Titus for appellants.

(1) The court erred in refusing a trial by jury of the questions of fact in this cause mentioned in the motion for such trial by appellants and as requested by appellants at the trial. Tinsley v. Kinney, 170 Mo. 317; Rutherford v. Williams, 42 Mo. 38; Smith v. Canning Co., 14 Mo. App. 522; New Harmony Lodge v. Railroad, — Mo. App. —, 74 S. W. 5. (2) The petition in the suit in partition, described all the lands in Missouri owned by John C. Larwill in his lifetime, and all persons having any interest, real or fancied, in such lands, including the present administrator, Joseph H. Larwill, were defendants therein. Upon the institution of such suit all of said lands and the increment thereof, became exclusively within the jurisdiction and control of said circuit court, and the probate court, an inferior tribunal, was wholly unauthorized by ex parte orders to turn said lands and their revenues over to a single individual, who at the time was a contestant in such prior pending partition suit. Seibel v. Simeon, 62 Mo. 257; Railroad v. Harris, 42 Kan. 223; Trust Co. v. Street Co., 177 U. S. 61; McFarlen Co. v. Wells, 99 Mo. App. 641; Mishawka Co. v. Powell, 98 Mo. App. 530; Purdy v. Gault, 19 Mo. App. 191; McDaniel v. Lee, 37 Mo. 204; Holland v. Anderson, 38 Mo. 55; Rathbone v. Warren, 10 Johns. (N. Y.) 595; Nelson v. Hatch, 15 Ala. 501; Henderson v. Dickey, 50 Mo. 161. (3) No inquiry or investigation as to the qualifications of Joseph H. Larwill for managing the property was had, nor were those of the heirs of said deceased living in Kansas City, notified or cited in any way as required by section 8 of the administration act, to either appear and qualify for administrator or given any opportunity or notice whatever, to show cause against the application of Joseph H. Larwill, who had just arrived in the town, and of necessity knew nothing of the property, or the tenants, or the requirements of

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either. That such notice or citation is necessary, see: Mullanphy v. County Court, 6 Mo. 564; Torrence v. McDougald, 12 Ga. 526; Sayre v. Sayre, 48 N. J. Eq. 267; 1 Woerner on Admr. (2 Ed.), sec. 262. There existed no good or sufficient reason for administration in this case. McCracken v. McCaslin, 50 Mo. App. 85; Langston v. Canterbury, 173 Mo. 122. (4) This administrator is a State officer, his appointment by whatever authority made is a civil appointment; and the evidence showing without contradiction that he had been but a few weeks at most in this State, prior to his appointment, the same must be adjudged void. State ex rel. v. Dillon, 90 Mo. 229; State ex rel. v. Walker, 132 Mo. 210; State ex rel. v. Bus, 135 Mo. 325; 1 Woerner on Administrators (2 Ed.), sec. 157; In re Estate of Ames, 52 Mo. 290. (5) Instruction 6, to the effect that the letters of administration, with the will annexed, were improperly issued by the probate court of Jackson county, states the law, and was improperly denied. The evidence of the Ohio executor, Mr. Smith and Mr. Jenner shows that the administration is pending on the estate of said John C. Larwill in Ohio, under the purported will of said deceased (abstract pages 59 and 63). Letters *cum testamento annexo* are not applicable or proper in the case of a foreign will, under which administration exists within the government of which the alleged testator was a citizen. Our statute nowhere justifies such letters on a foreign will. R. S. 1899, sec. 16. (6) Respondent now claims that his is merely an ordinary administration, auxiliary to the chief administrator in Ohio. This claim can not be maintained. An ordinary administrator merely distributes the effects of the deceased according to the law of Missouri governing descent and distribution, while an administrator *cum testamento annexo,* is bound to administer under the provisions of the will alone. 1 Woerner on Admr. (2 Ed.), 533, sec. 245; Bain v. Matteson, 54 N. Y. 663; Harper v. Smith, 9 Ga. 461;

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In re Eyster's Estate, 5 Watts (Pa.) 132. (7) There being substantially no debts owing by deceased in Missouri and no demand for an administration by any creditor, administration was wholly unnecessary. McCracken v. McCaslin, 50 Mo. App. 85; Langston v. Canterbury, 173 Mo. 122. (8) Section 42, R. S. 1899, enumerates among other causes requiring the removal of an administrator, that of unsuitability to execute the trust. Unsuitability includes and denotes among other meanings—hostility to one's coheirs or distributees. 1 Woerner on Admr. (2 Ed.), sec. 270; Gaston v. Hayden, 98 Mo. App. 693; Estate of Pike, 45 Wis. 391; Drews Appeals, 58 N. H. 319; May v. May, 167 U. S. 320. (9) Under such facts the law required the removal of respondent pending such litigation. R. S. 1899, sec. 13; State ex rel. v. Guinotte, 156 Mo. 513; Trust Co. v. Soderer, 171 Mo. 680. (10) The orders of the court, authorizing respondent to take possession of the lands and collect the rents, were wholly illegal. The purported will in evidence does not devise these lands or any part thereof, either directly or to anyone executor or otherwise, as trustee for others, and in nowise refers to them. Aubuchon v. Lary, 23 Mo. 99; Chambers v. Wright's Heirs, 40 Mo. 482; Thorp v. Miller, 137 Mo. 239; Estes v. Nell, 140 Mo. 654; Eneberg v. Carter, 98 Mo. 651; 11 Am. and Eng. Ency. of Law (2 Ed.), 821. (11) It was within the province alone of the circuit court, pending the contest regarding the land and the rents therefrom, which are a part thereof, to appoint a custodian as prayed in the petition in the suit in partition, wherein respondent was a party defendant, at the time of his obtaining this administration. Hagerty v. Duane, 1 Paige (N. Y.), 321; Townsend v. Sykes, 38 La. Ann. 862; Deitrich v. Deitrich, 154 Pa. St. 92; Trust Co. v. Soderer, 171 Mo. 675. (12) The action of the trial court was erroneous in sustaining the objection of respondent to witness Benjamin Hoyt, stating the tenor of the remarks made to

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witness by respondent in regard to the matter of his hostility and prejudice towards his nephews, the complainants. Seyforth v. Railroad, 52 Mo. 449; Eyerman v. Sheehan, 52 Mo. 221; Greenwell v. Crow, 73 Mo. 638; Haymaker v. Adams, 61 Mo. App. 585; Taylor v. Jackson, 83 Mo. App. 649; 1 Wharton on Ev. (2 Ed.), sec. 512-514 and note thereto.

Chas. B. Adams and *Wash Adams* for respondent.

(1) The court properly refused to submit the issues to a jury. This proceeding is of statutory creation and is brought under section 42, Revised Statutes of 1899. R. S. 1899, sec. 285; Bray v. Thacher, 28 Mo. 132; Whaley v. Whaley, 50 Mo. 577; Ely v. Koontz, 167 Mo. 371; State v. Bockstruck, 136 Mo. 335; State ex rel. v. Vail, 53 Mo. 97; State ex rel. v. Withers, 133 Mo. 500; Marshall v. Standard, 24 Mo. App. 192; Barnard v. Milling Co., 79 Mo. App. 153. (2) The suit instituted by the petitioners in this proceeding in the circuit court of Jackson county, seeking the partition and sale of the Missouri real estate belonging to John C. Larwill at the time of his death, was in direct contravention of the last will and codicil of said Larwill. The will and codicil were executed and proved in Ohio according to the laws of Missouri, and have been duly recorded in this State. R. S. 1899, sec. 4383; ex Parte Cubbage v. Franklin, 62 Mo. 328; Sikemier v. Galvin, 124 Mo. 367; Green v. Tittman, 124 Mo. 372. (3) Appellants further complain because no citation or notice of the intended application for letters was given to them and because no inquiry was held as to the qualifications of Joseph H. Larwill to properly manage the estate. The statutes governing such appointments are sections 7, 8 and 11, Revised Statutes 1899. Woerner's American Law of Administration, sec. 243. (4) It is contended that the letters issued to respondent should be revoked

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because he was and is "a non-resident of this State." The rule is well established in all jurisdictions that the motive or purpose of a change of domicile or residence, is not material. The only question is whether the change of residence is made by the party with the bona fide intention of becoming a resident of another State. Bradley v. Lowry, 122 Fed. 788; Morris v. Gilmer, 129 U. S. 328; Hall v. Schoenecke, 128 Mo. 661; State ex rel. v. Banta, 71 Mo. App. 32; Green v. Beckwith, 38 Mo. 384; Johnson v. Smith, 43 Mo. 499; Hewitt v. Weatherby, 57 Mo 499; Bank v. Cooper, 40 Mo. 169; Adams v. Abernathy, 37 Mo. 196. (5) In the case of Hathaway, 71 N. Y. 243, it is held that a referee is not a public officer within the meaning of the State constitution, prohibiting judges from exercising any power of appointment to public office. Mechem on Public Officers, sec 1. (6) The non-resident executors named in the will were not authorized to act in this State, either in collecting the debts due the estate, or in disposing of the property for the payment of debts and legacies. Emmons v. Gordon, 140 Mo. 498; Coleman v. Skinker, 56 Mo. 367; R. S. 1899, sec. 254; Spraddling v. Keeton, 15 Mo. 118. (7) It is contended that the will was being contested by petitioners and that the law required respondent's removal pending such litigation. It seems sufficient to say that a will, when once probated, can be contested only by a direct proceeding in the manner specified in sections 4622 and 4636, Revised Statutes 1899. Jourden v. Meier, 31 Mo. 40; Stowe v. Stowe, 140 Mo. 594. (8) Hostility to his coheirs is also alleged as a ground of removal against respondent. The only hostility existing between petitioners and respondent was that initiated by the former, when respondent attempted to collect the rents on the real estate, as one of the devisees under the will. (9) It is further contended that the order of the probate court authorizing respondent to take possession of the real estate in Kansas City and lease the same for a period not exceeding two years

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was illegal. This order was made in pursuance of sec. 130, Revised Statutes 1899, for the payment of debts. R. S. 1899, sec. 137. The order was obtained in good faith by the administrator on the advice of his counsel, Judge Black, and is within the statutory authority of the probate court, and was not improvidently made. Watson v. Watson, 110 Mo. 165; Shumate v. Bailey, 110 Mo. 411. (10) The court properly excluded the evidence of witness Hoyt stating his conclusions and opinion as the alleged hostility of respondent against the petitioners. Kruger v. Railroad, 84 Mo. App. 366 and authorities cited.

SMITH, P. J.—This is a procedure which originated in the probate court having for its object the annulment of the letters of administration, with the will annexed, granted to defendant Joseph H. Larwill on the estate of John C. Larwill, deceased, and to remove him. It was carried by appeal to the circuit court where, on a trial *de novo,* the facts which the evidence tended to prove were, briefly stated, about as follows, viz: That John C. Larwill, a resident of the State of Ohio, died during the month of August, 1901, at his home in Ohio, leaving a large estate in Ohio, Missouri and other States. The deceased disposed of his entire estate by will and codicil executed and proved according to the laws of Missouri, naming as his executors Paul Oliver and Richmond Smith, both residents and citizens of the State of Ohio, both of whom duly qualified as such and assumed charge of the estate in Ohio. The deceased left no children or descendents of children, and no father or mother surviving him; he was survived by his widow, a resident of Ohio, and by one brother, Joseph H. Larwill, the administrator in Missouri and respondent in this proceeding; the petitioners herein, O. H. and George A. Stevens, were sons of a deceased sister of John C. Larwill. O. H. Stevens received a legacy of $1000 in the will, which he sold and

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transferred to others; *that he is at present without any interest in said estate.* George A. Stevens received nothing under the will, being one of those expressly excluded from participation in the estate. At the time of his brother's death, the respondent, Joseph H. Larwill, was in the State of Montana, having only recently left his former home in the Territory of Oklahoma, where for four years he acted as postmaster of the city of Guthrie. He was then without a permanent home; while in Montana he received news of his brother's death, and went immediately to Ohio to advise with the executors of the estate about its care and management; he was advised by Mr. Smith, one of the executors, to go to Kansas City to look after the property there; Miller Stevens, who acted as the agent for deceased in caring for the Kansas City property had recently died and respondent was advised that the property needed attention. He went to Kansas City and his first act was to consult with Judge Francis M. Black, who had been the attorney for the deceased, as to the best course to pursue in the management of the estate. Judge Black advised him to declare his intention and to become a resident of Missouri, take up his residence, and thus qualify as administrator of the Missouri estate; this respondent did; he engaged lodging and board and became in good faith a resident of Kansas City, Missouri, and was appointed and qualified as administrator with the will annexed of the estate in Missouri. No citation or notice of his intended application for letters was given to petitioners or any one else. He was advised by Judge Black to procure an order from the probate court to take charge of and lease the real estate for the purpose of paying the local debts of the estate, and if necessary the local legacies. The probate court made the order and respondent took charge of the realty and collected rents therefrom for two years from the date of said order. One of the petitioners, George A. Stevens, was a tenant of one of the

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houses, and refused to pay rent for more than a year after the administrator took charge; he was the only defaulting tenant. The inventory filed, showed besides the real estate, personal property to the nominal amount of four or five thousand dollars, belonging to the estate in Kansas City. Defendant has faithfully accounted for all rents and other property coming into his hands, and objection is not made to any specific act of his in the care and management of the estate. A partition suit was filed by the petitioners herein in the circuit court demanding sale of Kansas City real estate, prior to the issuance of letters to respondent; this suit is designated as a contest by counsel, and it is claimed to have resulted in giving the circuit court prior jurisdiction over the realty involved. In the trial in the circuit court the petitioners applied for a jury trial which the court refused to grant, and the case was tried and the issues determined by the court alone. The prayer of the petition was denied by the court and judgment given accordingly, from which petitioners appealed here.

1. The petitioners complain of the action of the court in refusing to submit the issues to a jury. This is a proceeding bottomed upon section 42, Revised Statutes 1899, and is equitable in its nature. It would be impracticable, if not impossible, in such a case to dispose of the issues by the verdict of a jury. The whole matter was that which primarily rested in the discretion of the probate court. Whaley v. Whaley, 50 Mo. 577; Bradley v. Woerner, 46 Mo. App. 371; McClelland v. McClelland, 42 Mo. App. 32; In re Meeker, 45 Mo. App. 186; Terry v. McGowan, 68 Mo. App. 612. The proceeding is not an action for the recovery of money only, or for specific personal property, and therefore no right to a trial by jury was given in either the probate or circuit courts. [Bray v. Thatcher, 28 Mo. 132; Whaley v. Whaley, supra.]

It is contended that this proceeding is within the

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guaranty contained in section 28, article 2, of the constitution of this State, to the effect that, "the right to trial by jury as heretofore enjoyed." The right of trial by jury has been frequently construed by the appellate courts of this State as having reference solely to the status of that right as it existed at the time of the adoption of the constitution. [State v. Bockstruck, 136 Mo. 335; State ex rel. v. Vail, 53 Mo. 97; State ex rel. v. Withrow, 133 Mo. 500; Marshall v. Standard, 24 Mo. App. 192; Barnard v. Milling Co., 79 Mo. App. 153.] The section of the statute already referred to upon which this proceeding was brought is to be found substantially in its present form in the laws of 1825, section 16, p. 96, and in each succeeding revision. As authorized by that section it is entirely statutory, having no existence at common law. The right to trial by jury was never given in such cases by the statute, consequently that right has never been "heretofore enjoyed" in such procedure. It has been decided in this State that the constitutional guaranty of trial by jury has no application to cases of equitable cognizance. [Ely v. Koontz, 167 Mo. 371.] Such cases are properly triable by the court and the refusal of a demand for a jury is not error. [Long v. Long, 141 Mo. 352.] The authorities cited and relied on by the petitioners, it seems to us, are without application to a case of this kind.

2. As may be seen by reference to the numerous authorities cited by the industrious counsel for the petitioners, the general rule is everywhere established to the effect that, "when the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right can not be arrested and taken away by proceedings in any other court." But this rule can not with propriety be invoked and applied in a case of this kind. An examination of the will and codicil in the light of the authorities cited by counsel has led us to conclude that such will and codicil which were executed and proved in the State of Ohio according to

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the laws of this State and duly recorded in the latter State, under any fair and reasonable construction of the terms and provisions thereof, it must be held that the testator's entire estate, both real and personal, wherever situate, was thereby disposed of. The statute, section 4383, provided that no partition of lands devised by any last will shall be made contrary to the instruction of the testator expressed in any such will. In ex Parte Cubbage v. Franklin, 62 Mo. 364, it was said that, "our partition law is very broad but it at least provides that partition can not be made in contravention of a will. Indeed, if the contrary was held there would be no use in our statute allowing a testator to make a will." To the same effect is Sikemeier v. Galvin, 124 Mo. 367.

Again, it appears by the express provisions of the will that one of the petitioners, George A. Stevens, was excluded from any participation in the estate and that the other, Oscar H. Stevens, was given a legacy of $1,000 which he had sold and transferred to another, and so it results that neither of the petitioners now have any interest in the said estate. It is thus made obvious that the court in which the partition suit was brought was shorn of its jurisdiction by the statute, and the want of interest in the petitioners in the subject-matter of the suit. It must therefore be apparent that the rule in respect to jurisdiction of courts already referred to is wholly inapplicable in the present case. If the suit for the partition of the lands of the testator was forbidden by the statute, as we have seen was the case, then certainly the court in which it was brought did not by reason of the bringing of it thereby acquire jurisdiction over the *res* to the exclusion of that of the probate court.

But if we are in error in this conclusion, there is still another ground upon which the judgment must be upheld. The inventory shows that the testator left personal property in Jackson county, in this State, consist-

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ing of rents due at the time of his death amounting to several thousand dollars and a note due him for $500. In addition to these debts due to him there were debts due by him to Black and Owsley for something like $150. In view of these existing conditions the granting of letters to an administrator in this State to collect and preserve the testator's estate and pay his debts was entirely proper. [State ex rel. v. Moore, 18 Mo. App. 406; Green v. Tittman, 124 Mo. 372.] It may be that the debts of the testator in this jurisdiction were not sufficient in amount to authorize the probate court to order the administrator to take charge of his real estate, but however that may be, it is certain that the appointment of such administrator was warranted by the conditions under which it was made. If the order in respect to the testator's real estate was improperly made the same could have been set aside on motion for that purpose. The setting aside of this order in no way affected or annulled the grant of the letters. The latter would have been valid even though the order in respect to the real estate had been set aside. The letters were one thing and the order of the court directing the administrator to take charge of the real estate was another. The overthrow of the latter would be no ground for invoking the former.

It may be well doubted whether or not instructions have any appropriate place in a case of this kind, but if it is an action at law so far as to entitle the petitioners to a consideration of the issues by the court upon the theories propounded in the instructions requested by them, then we think, for the reasons previously stated, their number five denying jurisdiction to the probate court to grant letters of administration was rightly refused. We may add that, even if the partition suit was properly brought, and the court in which it was brought had exclusive jurisdiction of the real estate to the exclusion of that subsequently exercised by the probate court in ordering it into the charge of the administra-

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tor, still, that exercised by the latter court in granting letters of administration as to the personal estate of the testator was in no way trenched upon or ousted by that exercised by the former in the partition suit. Both proceedings may accordingly be carried on in the courts where begun without the wrongful exercise of jurisdiction by either.

3. The petitioners further contend that the respondent's letters should be revoked for the reason that no citation of his intended application for such letters was given to them and no inquiry was had as to his qualifications to properly manage said estate. By reference to sections 7, 8 and 11, Revised Statutes, it will there be seen that neither one of those grounds of contention can be sustained. Section 7 provides who shall be appointed administrators in the first instance. The persons coming in the preferred class in the order therein named subject to the approval of the court, judge or clerk in vacation are entitled to letters upon application without citation. This is made clear by section 8, which provides that if none of the persons mentioned in section 7, apply for letters within 30 days after the death of the deceased, the court, or judge or clerk may issue citation to him or them on motion of any person interested, to appear and qualify for administration, and if the person or persons so cited fail to administer within the time appointed, letters may be granted to a person or persons not included in section 7. The fact that section 8 requires notice, while section 7 does not, is conclusive that no notice is necessary in case of an appointment under section 7.

The evidence shows that John C. Larwill died a resident of Ohio, leaving a wife but no children or descendents of children. His estate would, in the absence of a will, have descended to his wife and to his brothers and sisters. The wife was at the time of his death, and continued to be a non-resident of this State; she was therefore not entitled to administer; the right of ad-

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ministration in Missouri devolved upon the brothers and sisters of the deceased. Section 11 provides that letters testamentary are to be granted to the persons appointed as executors in the will, but if all such persons refuse to act, or be disqualified, letters of administration shall be granted to the persons to whom administration would have been granted, if there had been no will. The executors named in the will being residents of Ohio, and non-residents of Missouri, were not qualified to act here. The respondent therefore, had a right, under the provisions of section 7, to act as administrator with the will annexed, if the court, or judge or clerk in vacation, believed that he would best manage and preserve the estate, without notice or citation to any other person or persons. Notice to the widow would have been a useless and unnecessary act, she then being a non-resident of this State and disqualified to act. In Woerner's Amer. Law of Adminis., sec. 243, the law is thus stated:

"Before any one can be appointed administrator *who is not in the preferred class,* notice must be given to those having a prior right, to appear and claim their privilege, or show cause why the applicant should not be appointed. To dispense with the citation, those having preference should renounce their claim, or signify their consent to the grant of the petitioner's request by indorsement upon the petition or some writing of record. *But no notice is necessary to the other parties in the same class with the applicant; the appointment may be made ex parte to any of those who are equally entitled.*" The statute nowhere provides for any trial or hearing to determine the qualifications of an applicant for letters of administration to properly manage the estate. The matter is left wholly within the discretion of the probate court, with the power to remove him if found to be unqualified.

It is further contended that the letters granted to respondent should be revoked because he was and is,

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"a non-resident of this State." The facts as to his residence are, that up to March 15, 1901, he had been a resident of Oklahoma Territory; having closed out his business there, he made a short visit to Ohio; from thence he went to Montana with a view of locating and going into business; he decided, however, not to remain in Montana, and was on the point of returning when he received a telegram announcing the death of his brother, John C. Larwill, in Ohio. He went to Ohio to consult with the executors named in his brother's will, about the estate and there learned of the death of Miller Stevens, the agent in charge of the Kansas City real estate. Mr. Smith, one of the executors, suggested to respondent that he go to Kansas City and assume charge of the property. This suggestion was adopted and respondent came to Kansas City, October 14, 1901, and attempted to take charge of the property and collect the rents, but was prevented by the action of petitioners herein, in notifying tenants not to pay any rent to respondent. He testified that he was then without any permanent home, and he thereupon, on or about October 15, 1901, decided to become a resident of Kansas City, Missouri, and so declared his intention, engaged board and lodging, opened a bank account, and did other things evidencing his intention to become a resident here and has resided in this city and State ever since. It may be conceded that the respondent became a resident of this State for the purpose of applying for letters of administration, having, under the will, one of the largest interests in said estate. Respondent had not been residing with his family for 13 years at the time of his becoming a resident of Missouri. His wife had resided abroad with her son superintending his education, and at the time letters were granted to respondent, was residing in Baltimore, Maryland, where her son was attending college.

The rule is well established in every jurisdiction that the motive or purpose of a change of domicile or

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residence, is not material. The only question is, whether the change of residence is made by the party with the bona fide intention of becoming a resident of another State. "A citizen of the United States is entitled to transfer his citizenship from one State to another by a change in domicile, whenever he desires to do so. And where there has been an actual removal with intent to make a permanent residence, and the acts of the party correspond with the purpose, the change of domicile is completed, and the law forces upon him the character of a citizen of the State where he has chosen his domicile, although he may have a wife, and declare himself a continuing citizen of the State he had left." 6 Am. and Eng. Ency. of Law (2 Ed.), 32. A change of domicile is consummated when one leaves the State where he has hitherto resided, avowing his intention not to return and enters another State intending to permanently settle there. [Bradley v. Lowry, 122 Fed. Rep. 788.] In Morris v. Gilmer, 129 U. S. 328, the court said: "We are thus brought to the question whether the plaintiff was entitled to sue in the circuit court; was he at the time of the commencement of this suit, a citizen of Tennessee? It is true as contended by defendant that a citizen of the United States can instantly transfer his citizenship from one State to another (Cooper v. Galbreath, 3 Wash. C. C. 546-554) and his right to sue in the courts of the United States is none the less because his change of domicile was induced by the purpose, whether avowed or not, of invoking for the protection of his rights, the jurisdiction of a federal court. As said by Mr. Justice STORY in Briggs v. French, 2 Sum. 251-256: 'If the new citizenship is really and truly acquired, his right to sue is a legitimate, constitutional and legal consequence, not to be impeached by the motive of his removal.' "

Whether a change of residence was affected in any case depends upon the intention with which the removal from the former domicile was made. [Hall v.

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Schoenecke, 128 Mo. 661.] The words inhabitant, citizen and resident mean substantially the same thing, and one is an inhabitant, resident or citizen of the place where he has his domicile or home. [State ex rel. v. Banta, 71 Mo. App. 32.] A man's residence is his home or habitation fixed at any place, without a present intention of removing therefrom. [Green v. Beckwith, 38 Mo. 384; Johnson v. Smith, 43 Mo. 499.] A husband and wife may have separate domiciles. [Hewitt v. Weatherby, 57 Mo. 276.] When a man is living separate from his wife, his domicile may be in one State, though his wife may reside in another. [Bank v. Cooper, 40 Mo. 169.] To constitute a domicile only two elements are necessary: one of the act and the other of the intention. [Adams v. Abernathy, 37 Mo. 196.]

The above authorities establish the proposition that respondent was a bona fide resident of Kansas City, Mo., at the time letters were granted to him. He has not changed his domicile, but has remained a resident of this city ever since that time. It is contended, however, that an administrator is a State officer and as such is included within the meaning of section 12, article 8, of the constitution of this State which declares that, "no person shall be elected or appointed to any office in this State, civil or military, who is not a citizen of the United States and who shall have resided in this State one year next preceding his election or appointment." An administrator belongs to the same class of officers as curators, guardians, receivers, referees, and the like, whose duties are private and concern private interests, and are in no sense of the term public. He is invested with no portion of the sovereign functions of the State to be exercised by him for the benefit of the public, and is therefore not an officer of this State within the meaning of the constitutional provision just quoted. We have been referred to no case in which it has been held that an administrator or any one of that class of subordinate officers to which he

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belongs is a public officer within the meaning of the said constitutional provision. The statute—section 10, Revised Statutes—does not require that an administrator shall have resided one whole year within this State, but only prohibits the appointment of a non-resident. It has been held in New York—71 N. Y. 238—that a referee is not a public officer within the meaning of a provision of the constitution of that State prohibiting judges from exercising any power of appointment to a public office.

Mechem on Public Officers, section 1, states that, "a public office is the right, authority and duty duly created and conferred by law, by which for a given period, either fixed by law, or enduring at the pleasure of the creating power, an individual is invested with some portion of the functions of government, to be exercised by him for the benefit of the public. As here used, the word 'office' is to be distinguished from its application to such positions as are at most *quasi* public only, as the charge of an executor, administrator, or guardian, and from the offices of a private corporation." Accordingly, we do not think the respondent's letters should be revoked on the ground of non-residence of this State.

4. The still further contention that the letters with the will annexed were improperly issued to the respondent, can not be upheld. The non-resident executors named in the will were not authorized to act in this State either in the collection of the debts due the estate of their testator or in disposing of his property for the payment of debts and legacies. [Emmons v. Gordon, 140 Mo. 498; Cabanne v. Skinker, 56 Mo. 367.] In a case where a will is left by a non-resident owning property in this State, we think the statute—section 254, Revised Statutes—requires the issue of letters testamentary with the will annexed to some person qualified to administer in this State. This conclusion is strengthened by reading that section, 254, in connection

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with section 11, already referred to, which provides when an administrator with the will annexed should be appointed.

It is no objection to the grant of letters in this State, that the estate is in process of administration in Ohio, where the testator resided at the time of his death. The administration here seems to be in the nature of an ancillary administration, as the statute —sections 255 and 266—provides that the balance in the hands of the administrator after paying all debts due citizens and others in this State may be transmitted to the foreign administrator in the State or country where the deceased had his domicile. [Spraddling v. Pipkin, 15 Mo. 118.] Instruction number six we think was not a correct expression of the law applicable to the facts which the evidence conduced to prove and it was therefore properly refused.

5. The suit for partition can not be regarded as a contest of the will. The will was duly probated and can be contested only by a direct proceeding in the manner required by sections 4622 and 4636, Revised Statutes. Such a proceeding has been held to be the exclusive remedy for contesting a will once admitted to probate and that its validity can not be attacked in a collateral proceeding. [Jourden v. Meier, 31 Mo. 40; Stowe v. Stowe, 140 Mo. 594.] The beginning of the partition suit therefore afforded no ground for the removal of the respondent from the office of administrator during the pendency of that suit.

The court at the request of the petitioners gave an instruction declaring that if the respondent, "is hostile towards the petitioners being heirs at law of the deceased, that then he should be removed as administrator." The court, it seems, did not find from the evidence that the administrator was hostile to the petitioners, and so refused to order his removal on that ground. The evidence does show that the respondent did sue and recover of one of the petitioners certain

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rents which were due to the estate by the latter and which he had refused to pay. Nothing is seen in this or any other fact disclosed by the evidence which would "intercept and prevent such a management and husbanding of the estate of the deceased as prudence, sound policy and the interest of the devisees and creditors required."

6. This is a proceeding, as stated at the outset, having for its object a judgment revoking and cancelling the letters of administration granted by the probate court upon the estate of the deceased. Now, if it be conceded that the order of the court authorizing the respondent, as such administrator, to take possession of the lands of the deceased and collect the rents was improper, what of it? Does that order constitute any ground for the revocation of the letters of administration? Suppose, further, that the order so made was in excess of the jurisdiction of the probate court, what has that to do with the appointment and grant of the letters of administration. Or, suppose still further, the lands sought to be partitioned was not disposed of by the will, or not needed by the administrator for the payment of debts due by the deceased in this State, or that the petitioners are heirs at law of the deceased, do any or all of these supposed facts, if found to exist, have any direct bearing on the vital issue in the case, viz.: Whether or not the letters of administration granted to respondent should be revoked and cancelled? We think not. The validity or invalidity of this order is a question entirely foreign to that which the appeal has brought before us for determination and therefore need not be further noticed.

7. During the progress of the trial the petitioners' counsel asked their witness, Hoyt, to state what the respondent said about petitioners as indicating his prejudice against them. To this question the witness answer, "I know that he did not speak very friendly." On motion of the respondent this answer was by the

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court stricken out, and of this the petitioners complain. It is the well-established general rule that a witness must state facts and not opinions. [Krueger v. Railroad, 84 Mo. App. 358.] Accordingly, it would seem that when it is sought to establish the fact that one person is hostile to, or prejudiced against another, that it is proper for a witness to state what was said, or the substance of it, so that the court or jury may determine therefrom whether such hostility or prejudice exists. The answer of the witness was but the deduction or opinion of the witness, which was improper. To allow such testimony was to invade the province of the court or jury trying the case, which, of course, was not permissible. If such testimony had been, as it was not, admissible, still we do not think its exclusion would have constituted reversible error, for the reason that a merely hostile or unfriendly feeling of the administrator to the petitioners would not have been material, or of any consequence, unless of such a character as to prevent such management of the estate of the deceased by him as prudence, sound policy and the interests of heirs, devisees and creditors require, of which there is no evidence here; on the contrary, it was shown that the administration had been well and prudently conducted all the way through.

As far as we are able to discover, the record in the case is barren of any error committed by the trial court prejudicial to the substantial rights of the petitioners, and it therefore results that the judgment will be affirmed. All concur.

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ANN E. HECKER, Respondent, v. CHICAGO & ALTON RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, December 19, 1904.

1. **PASSENGER CARRIERS: Alighting from Train: Contributory Negligence: Demurrer to Evidence.** Where a lady passenger sixty-three years of age, weighing two hundred pounds, alights from a train moving five or six miles an hour, she is guilty of contributory negligence precluding a recovery for injuries sustained.

2. **——: ——: Pleading: Variance.** Broaddus, J., in a separate opinion: The petition avers that after stopping at the station, and while plaintiff was in the act of alighting, the train was suddenly put in motion, causing the passenger to be thrown, etc. Evidence showed an attempt to alight from the train while in motion. *Held*, a fatal variance.

Appeal from Jackson Circuit Court.—*Hon. S. C. Douglass*, Judge.

REVERSED.

Scarritt, Griffith & Jones for appellant.

(1) The facts shown by the record about which there are no dispute show plaintiff to have been guilty of contributory negligence. Weber v. Railroad, 100 Mo. 194; Neville v. Railroad, 158 Mo. 293; Railroad v. Landauer, 36 Neb. 642; Straus v. Railroad, 75 Mo. 191; Nelson v. Railroad, 68 Mo. 593.

Hollis & Fidler for respondent.

(1) The question of contributory negligence was for the jury. The jurors being the judges of the facts and of the credibility of the witnesses and the weight of the evidence, this court will not disturb the verdict found for plaintiff. Black v. Railroad, 172 Mo. 177; Minnier v. Railroad, 167 Mo. 99.

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SMITH, P. J.—Action to recover damages for personal injuries. The petition alleged that, "when defendant's train arrived at the station of defendant at Marshall, Missouri, it stopped for passengers to alight therefrom; that plaintiff then and there attempted to alight from the car of said train together with a large number of other passengers when the defendant, without allowing plaintiff a reasonable time to alight and while she was in the act of alighting, did by its agents and servants in charge of said train carelessly and negligently put said train in motion without warning to plaintiff and while said servants knew, or by reasonable care and caution on their part would have known that plaintiff was in the act of alighting therefrom, which careless and negligent act in moving said train caused plaintiff to fall on the platform of defendant's depot with great force and violence, striking her head, body and limbs and greatly injuring her."

The undisputed evidence tended to prove that the plaintiff was a woman sixty-three years of age weighing about 200 pounds and accustomed to travel on railway trains; that she purchased of defendant an excursion ticket which entitled her to passage on its train from Kansas City to Marshall or Glasgow; that when the train on which she took passage reached Marshall the brakeman called out the station and the train accordingly stopped there; that plaintiff occupied a seat in the second car from the rear end of the train which consisted of nine cars; that it stopped at the station about seven minutes and then started forward, and when it had attained a speed of five or six miles an hour the plaintiff stepped off backwards from the step of the car on which she was riding and fell on the east end of the station platform which platform was 314 feet in length; that she suffered some considerable personal injuries from the fall. The verdict was for

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$500, on which judgment was given for her accordingly, and to reverse which this appeal is prosecuted here.

At the conclusion of the evidence the defendant requested and the court refused a peremptory instruction telling the jury that under the pleadings and evidence the plaintiff was not entitled to recover, and this action of the court is here urged as one of the grounds for the reversal of the judgment.

It may be well doubted whether or not under the evidence the plaintiff made out a prima facie case of negligence on the part of defendant entitling her to a submission to the jury. But conceding that the defendant was guilty of negligence, as alleged in her petition, was she not herself guilty of such contributory negligence as precluded her right to recover? It is needless to say that it was the duty of defendant to stop its train long enough to allow its passengers acting expeditiously to leave it in safety. [Richmond v. Railroad, 49 Mo. App. 104.] In respect to the issue of contributory negligence, it may be remarked that when the plaintiff undertook to leave the defendant's train it was moving at the rate of five or six miles an hour. It is not ordinarily negligence *per se* for a passenger to attempt to leave a moving train. [Murphy v. Railroad, 43 Mo. App. 348; Richmond v. Railroad, 49 Mo. App. ante; Peck v. Transit Co., 178 Mo. l. c. 627.]

Whether a railway company shall be held liable in damages for injuries sustained by a passenger attempting to leave a car of one of its trains while it is in motion will depend on all the circumstances as to whether it was prudent for him to make the attempt. When an injury has been received by the reckless act of a passenger in an attempt to leave a train while it is in motion no recovery can be had, although the company may have disregarded a duty imposed by law in failing to stop at a station long enough to enable passengers acting expeditiously to leave the same in safety. The circumstances of each case must be con-

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sidered in determining whether or not in that case there was contributory negligence. The circumstances to be considered in determining whether or not the plaintiff was guilty of contributory negligence are such as, speed of train, age and activity of the plaintiff, and the like. [Richmond v. Railroad, ante.] In Murphy v. Railroad, ante, the opinion was expressed that it was not necessarily negligence for a person to attempt to get off or on a train moving at four miles an hour. But in Gress v. Railroad, 109 Mo. App. 716, the opinion was expressed that, "if the plaintiff attempted to leave the defendant's train while it was moving at the rate of five miles and upwards an hour, the court was warranted in declaring, as a matter of law, that it was a reckless and imprudent exposure of his person to a peril, for which the defendant could not be held responsible."

In the present case a lady sixty-three years of age having an avoirdupois of two hundred pounds attempted to leave a train at a time when it had attained a speed of from five to six miles an hour. This, it seems to us, was such a reckless and imprudent exposure of her person to a peril as to preclude her right to recover for the injuries thereby sustained. Where the facts of a case, as here, are undisputed, and are such that reasonable minds can draw no other conclusion than that the plaintiff was in fault, then the court can determine the question of contributory negligence as one of law. [Fowler v. Randall, 99 Mo. App. l. c. 414; Gress v. Railroad, ante.] Tested by this rule, the case here is that in which we are authorized as a matter of law to conclude plaintiff guilty of such contributory negligence as disentitled her to a recovery.

Accordingly, we must hold that the court erred in denying defendant's demurrer to the evidence, and for that reason the judgment must be reversed. All concur.

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SEPARATE CONCURRING OPINION.

BROADDUS, J.—I agree to the conclusion arrived at by Presiding Judge SMITH in the opinion that plaintiff was not entitled to recover. But I base my conclusion on the ground that plaintiff's evidence did not support the allegations of her petition, which are to the effect that after the train had stopped at the station, and while she was in the act of alighting, the train was suddenly put in motion, which caused her to be thrown upon the platform, whereby she was injured. If she attempted to alight from the train while it was in motion she was not entitled to recover, as it made no difference how slow the train was moving, for she did not seek to recover for negligence of defendant while she was attempting to alight from a moving train. [Peck v. Transit Co., 178 Mo. 627; Bond v. Railroad, 110 Mo. App. 131.]

J. H. RIEGER, Appellant, v. G. A. WELLES et al., Respondents.

Kansas City Court of Appeals, November 23, 1903, and February 6, 1905.

1. **LANDLORD AND TENANT: Covenant to Put in Possession: Waiver.** Where a tenant is advised that a preceding tenant intends to hold over a part of the leased premises, and on the day of the commencement of the lease such preceding tenant is still in possession, but the new tenant enters into possession of the other part of the premises and pays the full month's rent for the whole of it, the latter tenant accepts constructive possession of the part retained by the former tenant and after such waiver may not complain that he was deprived of the actual possession of such portion of the premises.

2. **EVIDENCE: Abstract: Lease: Appellate Practice.** Where a lease is not set out in the abstract for the reason that it is

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not in power or possession of the appellant, the appellate court cannot review the action of the trial court in refusing to admit it in evidence.

3. **LANDLORD AND TENANT: Duty to Put in Possession: Action.** Where a tenant is prevented by a wrongdoer from taking possession he is not compelled to proceed against the latter but may bring his action against his lessor on his covenant to deliver possession.

Appeal from Jackson Circuit Court.—*Hon. E. P. Gates*, Judge.

REVERSED AND REMANDED.

Edward C. Wright and *James C. Rieger* for appellant.

(1) On the undisputed facts plaintiff was entitled to recover. The lease contained a covenant to pay the rent but contained no covenants on the part of the lessor. The defendants signed the lease, accepted possession of a part of the leased premises, knowing that Crowe was in possession of the other and smaller part. This agreement on their part waived the full performance of any implied covenant on the part of the plaintiff for full possession of the property. Prior v. Kiso, 81 Mo. 249; R. S. 1889, sec. 6371. (2) The lease contained an express covenant to pay rent and from such express covenant nothing will release the tenant but an eviction, unless the tenant was otherwise legally entitled to quit possession, or the landlord accepts another person as tenant. Churchill v. Lammers, 60 Mo. App. 244; Bailey v. Wells, 8 Wis. 141; Gardner v. Keteltos, 3 Hill (N. Y.) 330; Kelley v. Clancy, 15 Mo. App. 519; Jones v. Barnes, 45 Mo. App. 590; Whiston v. McCarthy, 32 Mo. App. 430; Ward v. Krull, 49 Mo. App. 449. (3) The exclusion of the lease between Rose and the defendants was reversible error. The defendants did take possession of the whole premises and this lease goes to show that the eviction claimed was not real but

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fanciful. Ouster from possession is not alone sufficient to make the landlord responsible; it must further appear that the ouster was through the landlord and that the tenant dissented at the time. Perry v. Wall, 68 Ga. 70; Odgen v. Sanderson, 3 E. D. Smith 166.

Porterfield, Sawyer & Conrad for respondents.

(1) The lessor cannot recover against his lessee where he has not put the lessee in possession of the leased premises. Rent is something given by way of compensation to the lessor for the use of the land, and, if any act or omission of the lessor prevents the lessee from using the land at the time and in the manner provided in the lease, the lessor cannot recover rent. Taylor on Landlord and Tenant (8 Ed.), sec. 176; Clark v. Butt, 26 Ind. 236; Coe v. Clay, 5 Bing. 440; Jenks v. Edwards, 11 Exch. 774; Hughes v. Wood, 50 Mo. 350; Hay v. Cumberland, 25 Barb. (N. J.), 594; Smith v. Thurston, 19 Mo. App. 48; 1 Taylor on Landlord and Tenant (8 Ed.), sec. 377; Subway Co. v. St. Louis, 69 S. W. 294; Jackson v. Eddy, 12 Mo. 209; Kean v. Kolkschneider, 21 Mo. App. 538; Tunis v. Grandy, 22 Gratt. (Va.) 109; Spencer v. Burton, 5 Blackf. (Ind.), 59. (2) It was the duty of the appellant to deliver possession of the leased premises to the respondents at the time fixed in the lease for the beginning of the term. Taylor on Landlord and Tenant (8 Ed.), sec. 176; Hay v. Cumberland, 25 Barb. (N. J.) 594; 12 Am. and Eng. Ency. of Law, 686, 696; Kean v. Kolkschneider, 21 Mo. App. 538; Smith v. Thurston, 19 Mo. App. 48; Reed v. Reynolds, 37 Conn. 469; McClurg v. Price, 59 Pa. 420; Spencer v. Burton, 5 Blackf. (Ind.), 59; Coe v. Clay, 5 Bing. 540; Hughes v. Wood, 50 Mo. 350. (3) If the landlord cannot put the lessee into possession of all the premises described in the lease, the lessee will be justified in abandoning the whole lease. Smith v. Thurston, 19 Mo. App. 58; Taylor on Landlord and

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Tenant (8 Ed.), sec. 177; Hays v. Cumberland, 25 Barb. 594; 12 Am. & Eng. Ency. of Law (1 Ed.), 686, 696; Kean v. Kolkschneider, 21 Mo. App. 538; Prior v. Kiso, 81 Mo. 249; Reed v. Reynolds, 37 Conn. 469; McClurg v. Price, 59 Pa. 420. (4) The fact that the lessees went into possession of part of the room, did not affect their right to rescind the lease, when they found that they could not get full possession, as provided in the lease. Taylor on Landlord and Tenant (8 Ed.), secs. 176 and 177; Hay v. Cumberland, 25 Barb. 594; 12 Am. and Eng. Ency. of Law (1 Ed.), 686, 696; Jackson v. Eddy, 12 Mo. 132; Smith v. Thurston, 19 Mo. App. 48; Kean v. Kolkschneider, 21 Mo. App. 538; Reed v. Reynolds, 37 Conn. 469; McClurg v. Price, 59 Pa. 420.

SMITH, P. J.—Action for rent. The plaintiff was the owner of a storeroom which was divided into two rooms, Nos. 1028 and 1028½ on Union avenue in Kansas City. On September 17, 1898, the Heim Brewing Co. occupied the former of these rooms for storage purposes under some kind of an agreement with the plaintiff. One Crowe occupied the latter under a lease expiring on October 1, 1898. On the said 17th day of September the plaintiff and defendants entered into a written lease by the provisions of which the former demised to the latter said storeroom for the term of five years at a rent reserved of one hundred and seventy-five dollars per month, the term to begin on October 1, 1898. It appears that Crowe as well as defendants were what is commonly known as "ticket brokers." The testimony of the plaintiff was that before the making of the lease to the defendants, Crowe came to him—plaintiff—saying that his business had not been profitable and that he would like to remain in possession until after the fall festivities—some twenty days beyond the date of the expiration of his lease—but that he—plaintiff—had refused to grant his request.

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It appears that on the same day the lease was executed and immediately thereafter the plaintiff wrote a notice to Crowe and delivered it to the defendants to be by them delivered to Crowe informing him that the storeroom had been leased to defendants and that they had agreed to arrange with him (Crowe), if he so desired, to remain in the room, 1028½, occupied by him on the same terms that he was then paying. This notice the defendants caused to be delivered to Crowe.

On the same day, but after the execution of the lease, the defendants also entered into a written stipulation to the effect that as they had entered into said lease with plaintiff they thereby agreed to allow said Crowe to retain possession of said room—1028½—until October 20, 1898, provided he so desired and would pay to them the rent on the first day of that month at the rate of $100 per month. It further appears that at the date of the execution of the lease the plaintiff delivered to defendants the keys to the said storeroom.

The Heim Brewing Co. vacated room 1028 during the latter part of September and the defendants went into actual possession of that room. It appears that Crowe declined to avail himself of the privilege accorded him by the defendants in their stipulation supplementing the lease, or to vacate at the expiration of his lease. About the 24th of September the defendants according to their own testimony were informed by Crowe that he would not avail himself of the privilege accorded to him by the stipulation to the lease but that he intended to continue his occupancy through the coming month of October. With this knowledge the defendants on the first day of October went to plaintiff and paid the $175 rent required by the lease for that month. A few days later on, the defendants complained to plaintiff that Crowe was still in possession, and also requested the plaintiff to bring a suit for the recovery of the possession; and to this request the latter declined to accede, insisting that it was the duty of defendants

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to bring such suit. On the 7th of October the plaintiff brought his suit of unlawful detainer against Crowe. For one cause and another the suit dragged along until plaintiff dismissed it, Crowe in the meantime having vacated the room. The plaintiff testified that according to his understanding the forcible detainer suit was brought by his attorney at the instance of the defendants; that he did not think that Crowe was his tenant for the reason defendants had told him that as they had a five years' lease that they would put him (Crowe) out if he did not avail himself of the stipulation supplementing the lease and pay the rent.

On October 22, before the plaintiff dismissed the unlawful detainer suit, the defendants gave plaintiff notice that they had rescinded the lease because he had not delivered the possession of the storeroom to them as he was bound to do under the lease. They then vacated the room and refused to pay further rent. The cause was tried before the court without the aid of a jury. It found for the defendants. It is impossible to tell upon what theory the cause was determined for the defendants since no declarations of law were requested or given outside of that of a peremptory character refused for plaintiff.

When the defendants entered into the lease they knew that Crowe was in the possession of one room—1028½—under a lease that would not expire until October 1, 1898, and by their supplementary stipulation they agreed that he might remain until November following if he so desired on payment of certain rent. They were put in possession of 1028 on the 24th of September preceding the day named in the lease on which their term was to begin. Before this they were advised by Crowe that he did not intend to vacate 1028½ on October 1, and they knew, too, when that day arrived that he was still in possession not intending to vacate until November 1, and that notwithstanding this, they paid the October rent without, as plaintiff testifies, say-

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ing a word about the occupancy of Crowe or complaining that they had not been put in possession of the entire storeroom. Under these circumstances we must think that they thereby waived the covenant implied by the lease requiring plaintiff, lessor, to put them in possession of the entire store on the day that the term of their lease began. They thereby accepted and substituted the constructive possession of No. 1028 and could not, after such waiver, complain that they were deprived of the actual possession of that room. Besides this, it appears that after Crowe had notified them that he would not "recognize them" and intended to remain in possession during October under some sort of prior verbal lease with plaintiff, that the defendants told plaintiff that inasmuch as they had a five years' lease on the property that they themselves would take such steps as they thought proper in respect to dispossessing Crowe, and that this was a matter in which he need not concern himself.

There was evidence tending to prove that shortly after October 1 the defendants re-rented of a Mr. Rose the room which they had been occupying and then gave the plaintiff notice that they had rescinded their lease with him. The plaintiff offered this lease in evidence but the offer was by the court rejected. It was not preserved in the bill of exceptions for the reason, as therein stated, that Mr. Rose had "withdrawn it and would not permit the plaintiff's attorney to have it so that he might copy it into the bill of exceptions." We cannot in this state of the record pass upon the propriety of the action of the court in respect to the exclusion of it.

The plaintiff contends with much seeming plausibility that the Rose lease shows the reason why the defendants changed front and sought to rescind plaintiff's lease, and that it was the obtaining of the Rose lease rather than the possession of Crowe that induced them to seek the recission of that from plaintiff. Since

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the testimony was so much at variance and took such a wide range, we should think from all we can discover in respect to the Rose lease that it should have been received and considered along with the other evidence. It may be that it would have thrown some light on the issue. Its existence probably would account for why the defendants finally refused to bring suit to dispossess Crowe. The plaintiff testified that he did bring the suit but that he supposed his attorney brought it at the instance of and for defendants, and that when he learned otherwise he dismissed it. Under the circumstances we cannot discover that the suit brought by plaintiff against Crowe and afterwards dismissed by him has any important bearing on the case.

It is not disputed that under the written lease of plaintiff to Crowe that his term expired on the day before that of defendants', under their lease, began. In other jurisdictions it has been held that where a landlord has the right to the possession and makes a lease, the lessee acquires that right and must take the legal steps required to obtain possession of a prior tenant holding over without right. [Field v. Herrick, 101 Ill. 110, and other cases cited in plaintiff's brief.] And in this State it is held that the tenant, whose occupancy is prevented by a wrongdoer is not compelled to proceed against him but may take his action against his lessor on his covenant to deliver possession. [Hughes v. Hood, 50 Mo. 350.] And the rule is the same where it is through the agency of the landlord that the lessee fails to get possession. [Jackson v. Eddy, 12 Mo. 209; Smith v. Thurston, 19 Mo. App. 48; Kean v. Kolkschneider, 21 Mo. App. 538.] But these rules have little or no application to a case like this (though much discussed in the briefs of counsel) for the reason that the implied covenant requiring the delivery of the possession was waived. It inevitably results from this that the defendants had no right to rescind the lease nor to claim exemption from liability

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for rent. We are unable to determine upon what theory the court determined the case adversely to plaintiff. We are inclined to think the judgment is for the wrong party, yet, in view of the contradictions in the evidence, it might be given either way. We do not feel that the judgment in the present record ought to stand and so we will reverse it and remand the cause, so that it may be tried again. All concur.

PER CURIAM.—On a rehearing and reconsideration of this case the opinion heretofore written by *Smith, P. J.*, was adopted.

A. E. CULLEN, Respondent, v. ELIZABETH COLLISON, Appellant.

Kansas City Court of Appeals, April 4, 1904, and February 6, 1905.

JUSTICES' COURTS: Change of Venue: Notice: Jurisdiction. On a change of venue the justice to whom the case is sent must set the same for trial and cause the parties to be notified, which notice must be served as an original summons. Until the statute is complied with any judgment rendered by the justice is premature but not void or subject to collateral attack, since the court had jurisdiction of the subject-matter and the parties.

Appeal from Grundy Circuit Court.—*Hon. P. C. Stepp*, Judge.

AFFIRMED.

O. G. Williams and *W. G. Callison* for appellant.

(1) The holding of the court that the judgment rendered by Justice Embry was voidable only, and not absolutely void, was reversible error. Ryan v. Kelly, 9 Mo. App. 396; Railroad v. Warden, 73 Mo. App. 120. (2) Service of legal process in Justice Linney's court

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did not give Justice Embry jurisdiction of the person of defendant. R. S. 1899, secs. 3973, 3974; Laughlin v. Fairbanks, 8 Mo. 367; Caldwell v. Lockridge, 9 Mo. 362. (3) The motion to quash the execution is a direct and not a collateral proceeding. Anderson's Law Dictionary, definition of the word "Collateral;" Webster's Dictionary, same word; R. S. 1899, sec. 3223-4-5; State v. Slavens, 75 Mo. 510; State v. Barclay, 86 Mo. 56; Norton v. Quimby, 45 Mo. 391; Johnson v. Latta, 84 Mo. 142; Dillon v. Rash, 27 Mo. 244; Ruby v. Railroad, 39 Mo. 484; Wernecke v. Wood, 58 Mo. 356. When it was shown the trial judge that the process of "elimination by substitution" had been applied to the void judgment of Embry for the evident purpose of rendering it only voidable and that the transcript judgment filed was a falsity, he should have quashed the execution issued thereon if no other reason appeared. No party can take advantage of his own wrong. Trigg v. Ross, 35 Mo. 168; Medlin v. Platt Co., 8 Mo. 239; Lubbering v. Kohlbrecher, 22 Mo. 598; Lee v. Harman, 84 Mo. App. 161; Bresnehen v. Price, 57 Mo. 424; Bank v. Hober, 8 Mo. App. 176. (4) In proceedings like this the plaintiff must always stand sponsor for his judgment, whether it be only an irregular or voidable one, or a judgment that is absolutely void upon the face of the whole record. Bauer v. Bauer, 40 Mo. 61; James v. Roy, 59 Mo. 280; Triggs v. Ross, 35 Mo. 165; Pratt v. Canfield, 67 Mo. 50; Cochran v. Thomas, 131 Mo. 272.

H. A. Kerr and *S. S. Kelso* for respondent.

(1) The only evidence offered or attempted to be offered at the hearing in circuit court was that of Justice Embry as to the notice and his testimony shows that he made two entries one of which recited as follows: "May the 16, 1901, notice returned executed as the law directs." Now it was for the court to determine and not the defendant whether the notice was

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sufficient or not. Railroad v. Warden, 73 Mo. App. 121. A return served as the law directs, held good in 45 Mo. 391. (2) "A complaint which admits some notice but assails the judgment because of the insufficiency of such notice would appear to be a collateral attack." Railroad v. Warden, 73 Mo. App. 117. That a judgment regular on its face cannot be attacked collaterally is so elementary as to require no citations of authority, but we cite: Livingston v. Allen, 83 Mo. App. 294; Ibid, 83 Mo. App. 79; Bedford v. Sykes, 168 Mo. 8; Reed v. Nicholson, 158 Mo. 624. (3) What is a collateral attack? Johnston v. Realty Co., 167 Mo. 325. (4) None of the authorities cited in appellant's brief have any application to this case.

BROADDUS, J.—This suit was instituted by plaintiff on an account against defendant before a justice of the peace in Trenton township. On defendant's application a change of venue was granted and the cause sent to W. H. McGrath, a justice in the same township. Thereupon, plaintiff applied also for a change of venue and the cause was sent to J. B. Embry, a justice of the peace in Jefferson township, who issued a notice directed to defendant notifying her of the change in time and place of trial, etc. This notice was served upon W. G. Callison, defendant's attorney, as shown by the return of the officer. On the day named for the trial, defendant did not appear and judgment was taken against her by default. The plaintiff on the 25th of February, 1902, filed a transcript of her judgment before said Embry in the office of the clerk of the circuit court of the county upon which an execution was duly issued. Whereupon, defendant filed her petition in vacation with the circuit judge of the county setting up the foregoing facts and asking that the said judgment be stayed. The judge granted the order. When the case came before the court in session the order staying the execution was vacated and the motion

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to quash the execution was overruled. Defendant appealed.

The contention of defendant is that Justice Embry had no jurisdiction to render said judgment because the law required that the said notice be served on the defendant and not her attorney. Section 3974, Revised Statutes 1899, provides that a justice to whom a cause is sent shall set the same for trial and cause the parties to be notified thereof in writing, which notice shall be served on the parties not less than five nor more than fifteen days before the day fixed for such trial. The notice may be served in like manner as an original writ or summons.

There is no question but what the notice was not served in the manner directed by the statute; and until the statute in that respect was complied with, or such notice was waived, any judgment rendered by the justice was premature. But it was not void. The court had jurisdiction of the subject-matter of the suit and of the parties. When the court has jurisdiction of the parties and the subject-matter its judgment is not open to collateral attack, even though rendered prematurely. [Reed Bros. v. Nicholson, 158 Mo. 624.] "It is a well-established principle that a judgment regular on its face can not be impeached collaterally, and this rule applies to judgments rendered by justices of the peace." [Livingston v. Allen, 83 Mo. App. 294.]

The law is too well settled for controversy. All concur.

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L. W. SCOTT, Administrator, etc., Respondent, v. CITY OF MARSHALL, Appellant.

Kansas City Court of Appeals, February 6, 1905.

FOURTH CLASS CITIES: Ordinance: Sidewalk: Shade Trees. A city of the fourth class has power by ordinance to condemn a sidewalk, and it is not liable in damages for the removal thereof when so condemned, nor is it liable for the destruction of shade trees in front of a lot which are an obstruction to the proper and uniform construction of a sidewalk.

Appeal from Saline Circuit Court.—*Hon. Samuel Davis*, Judge.

REVERSED AND REMANDED (*with directions*).

J. F. Barbee and *Duggins & Rainey* for appellant.

(1) The verdict was for the right party; and though there may be some error in the instructions given by the trial court the rights of the respondent were not prejudiced. He failed to make out his case. In no event can the city of Marshall be held in damages upon the allegations of his petition and the evidence offered to sustain them. (2) The power of the board of aldermen of the defendant city to condemn old sidewalks and order new ones constructed is a legislative power conferred by the statutes. R. S. 1899, secs. 5960, 5989 and 5991. It may be exercised from time to time as the wants of the corporation may require; and of the necessity and expediency of its exercise the governing body of the corporation, and not the courts is the judge. McCormack v. Patchen, 53 Mo. 36; Farrar v. St. Louis, 80 Mo. 392; Skinker v. Heman, 148 Mo. 349, 64 Mo. App. 441. (3) A legislative act of the city within its charter authority, cannot be reviewed except for fraud, or unless it appear that it is a product of whim or caprice and in violation of common right.

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Skinker v. Heman, 148 Mo. 349; Marionville v. Henson, 65 Mo. App. 397. (4) The respondent is not entitled to damages for the destruction of his shade trees. Of his own volition he planted these trees in the street. He, at that time, had no property rights in the soil of the street, except such as were subject to all rightful and reasonable uses which might be imposed upon it by the city. Building Assn. v. Telephone Co., 88 Mo. 217; Ferrenback v. Turner, 86 Mo. 419; Mfg. Co. v. Railroad, 113 Mo. 317; Gamble v. Pettijohn, 116 Mo. 375; Williams v. St. Louis, 120 Mo. 403; Brown v. Carthage, 128 Mo. 14; Colston v. St. Joseph, — Mo. —.

Robert M. Reynolds, W. G. Lynch and *L. W. Scott* for respondents.

(1) Damages resulting to property-owners from the changing of grades of streets and the like and for cutting down and destroying trees in front of the property, are damages for the public use within the meaning of the Constitution. McAntire v. Telephone Co., 75 Mo. App. 540; Walker v. Sedalia, 74 Mo. App. 74; Cole v. St. Louis, 132 Mo. 640. The appellants in their brief, however, apparently undertake to pass by and ignore the errors committed against the respondent upon the trial of the cause, and on account of which the motion for a new trial was granted and invoke the doctrine that notwithstanding the errors committed upon the trial of the cause they were entitled to a judgment upon the verdict, and that therefore the new trial should not have been granted in any event, and in support of this contention say that respondent failed to make out a case. That under the allegations of his petition and the evidence offered to sustain them, the appellant city of Marshall can in no event be held in damages. (2) It is no answer to respondents' claim for appellant to say that it had the right to cut the trees and destroy the sidewalk. It is not the question primarily in this

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case as to the appellant's rights to make improvements whenever deemed proper and necessary by it (even when proceeding strictly in the manner provided by law for the exercise of such power) but the question rather is as to the right of the respondent property-owner to damages for his property injured or taken for a public improvement, or as to the right of the appellant city to take or damage respondent's property for a public improvement without compensating him therefor. Sec. 21, art. 2, Constitution; Walker v. Sedalia, 74 Mo. App. 71; Rives v. Columbia, 80 Mo. App. 172; McAntire v. Telephone Co., 75 Mo. App. 540. (3) Appellants claim that because they have the right to build sidewalks, etc., that therefore they have the right without anything more to tear up sidewalks already down, but such is not the law. R. S. 1899, sec. 5991. (4) As to whether respondent had any property interests and rights in the trees, situated as the evidence shows they were, we submit that this court in two able, exhaustive opinions, in which all the points now urged by appellant were considered, has decided in favor of respondent's contention. Walker v. Sedalia, 74 Mo. App. 74; McAntire v. Telephone Co., 75 Mo. App. 540; Lockland v. Railroad, 31 Mo. 180; Bridge Co. v. Schanbacher, 57 Mo. 582; Gamble v. Pettijohn, 116 Mo. 375; Snoddy v. Bohn, 122 Mo. 488; Grant v. Moore, 128 Mo. 49; Thomas v. Hunt, 134 Mo. 399.

JOHNSON, J.—The plaintiff in 1879 became the owner in fee of lot 85 situate on the north side of East Arrow street in the defendant city, and in that year erected thereon a dwelling house and other improvements. In the same year that he acquired title to the lot he planted a row of maple and elm trees in front of it. These trees were about five feet from his lot line as he then understood its location; but about four and one-half feet from the line as located at the time of the doing of the work complained of. Later on he

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laid down in front of his lot a brick pavement four feet seven inches wide along the sidewalk next his lot. The city had not at that time fixed the grade of the street. The pavement was laid down on the natural surface of the ground. In 1900 the defendant established the grade on Arrow street in front of plaintiff's lot which coincided very nearly with that of the natural surface of the ground along there. In the same year, the defendant—a city of the fourth class—passed an ordinance by which it condemned the sidewalk in front of plaintiff's lot and ordered the street commissioner to remove the same. It was ordered by the same ordinance that an artificial stone sidewalk be constructed and laid down (including grading) according to the plans and specifications on file with the city clerk. The specifications, which were part of the ordinance, required that all trees, stumps and roots for at least twelve inches below the grade of the sidewalk for the full width of the parkway be removed by the contractor. It was further therein required that the parkways should be graded to the full width thereof from the line of the curb to the line on either side, etc. It was further specified that the proportion of the parkway to be occupied by the sidewalk be excavated to a sub-grade twelve inches below the general grade of the parkway. All the evidence on the subject, including that of the plaintiff himself, is to the effect that the proposed sidewalk could not be made five feet in width without the removal of the shade trees. All of them would either stand within the line of the sidewalk or so close thereto that their growth would produce displacement of the walk or portions thereof. The contractor, in performing the contract took up and removed the old brick pavement, cut down the trees, made the excavation and constructed the kind of sidewalk required by the specifications.

The plaintiff brought this action to recover damages for the tearing up of his sidewalk and cutting down

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his trees. In his petition he alleged that the defendant destroyed his trees without having found or declared that the same were an obstruction of the street or dangerous to the public use of such street, and caused his sidewalk to be torn up and removed without having found and condemned the same as defective. It was further alleged that the defendant did not take the steps required by law to assess the damages resulting to him from such change of grade and the destruction of his trees and sidewalk, etc.

The answer was a general denial. There was a trial and verdict for defendant which, on motion of plaintiff, was set aside; and from this order of court defendant appealed.

The defendant under its charter was authorized to open and improve streets and make sidewalks and establish grades for all improvements. [R. S., sec. 5979.] Its charter further conferred upon it the general power, when it deemed it necessary, to "otherwise improve any street within its limits." [Sec. 5899.] The power to provide for the removal of obstructions from its sidewalk was another conferred by its charter. [Sec. 5960.] And in addition to these, it was given the power by ordinance to condemn wooden and defective sidewalks. [Sec. 5991.]

Under the grant, "otherwise to improve any street," the defendant had power to pass the ordinance condemning and ordering the removal of the old brick sidewalk. The power exercised by the legislative department of the defendant in the passage of the ordinance was within the terms of the grant itself—section 5991—and not such as was merely incidental to its power as a city of the fourth class. With the exercise of such power the courts do not interfere. The old brick sidewalk was several inches above the established grade and was neither of the materials nor width of the new one ordered to be constructed. The ordinance in so far as it condemned and ordered the removal of

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the old sidewalk and for replacing it with another to be constructed of artificial stone in conformity to the plans and specifications was an authorized exercise of the legislative power of the defendant. As the ordinance in this respect is not subject to interference by us, the sidewalk was, in legal contemplation, not different than if it had not been previously paved by plaintiff at all. The old pavement having been condemned by defendant no damage could result from its removal to make place for that ordered in its stead.

The ordinance is not as artistic and explicit as it might have been, still, we think it is sufficient to show the condemnation of the old sidewalk; and in view of the condition in which the evidence shows it to have been, we are not prepared to say that condition did not justify its condemnation; nor that the action of the city in removing it was an unreasonable and oppressive exercise of its discretionary powers.

So, too, with respect to the shade trees. There is enough in the record to show that their removal was ordered by the defendant not oppressively nor unreasonably but because if permitted to stand they would be an obstruction to the proper and uniform construction of the sidewalk. The evidence is all one way upon the fact that they were such obstruction. The plaintiff had no property-right in the trees which prevented the defendant from removing them when they interferred either with public travel or with the improvement of the street according to a general plan. [Colston v. St. Joseph, 80 S. W. 590; Gamble v. Pettijohn, 116 Mo. 375; Smith on Munic. Corp., sec. 1311.] In removing such obstructions defendant was acting strictly within the powers conferred upon it by charter. [R. S., sec. 5960.]

It is unnecessary to review the instructions. Under the views herein expressed, a peremptory instruction should have been given to find for defendant. The verdict was for the right party and the action of the trial

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court in sustaining the motion for new trial is reversed and the cause remanded with directions to enter judgment for defendant. All concur.

LEE WINKELMAN, Respondent, v. KANSAS CITY ELECTRIC LIGHT COMPANY, Appellant.

Kansas City Court of Appeals, February 6, 1905.

1. **ELECTRIC WIRES: Negligence: Insulation: Degree of Care.** Persons maintaining electric wires must use the utmost care to insulate them thoroughly and keep them so and an instruction to this effect is approved.

2. ———: ———: ———: **Injury.** And the fact that one coming in contact with such wires is injured is conclusive evidence of imperfect insulation and therefore of negligence.

3. ———: ———: ———: **Sudden Break.** In regard to what would be the effect of a sudden break followed by injury before the owner learned thereof or could repair the same is not decided.

4. ———: ———: ———: **Contributory Negligence.** Where the injured party is guilty of contributory negligence there is no liability.

5. **ACTION: Pleading: Ordinance.** Though a petition declare on an ordinance regulating electric wires and the ordinance is not introduced in evidence, yet, if the petition after rejecting the allegations relating to the ordinance contains enough to constitute a good cause of action at common law it will support the judgment.

Appeal from Jackson Circuit Court.—*Hon. James Gibson,* Judge.

AFFIRMED.

Boyle, Guthrie & Davison for appellant.

(1) The plaintiff pleaded a liability by reason of the alleged violation of an ordinance. No evidence of

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any ordinance was introduced. The plaintiff was permitted to recoved on an alleged common law liability. This he was not entitled to do under the pleadings. McManamee v. Railroad, 135 Mo. 447; Holliday v. Jackson, 21 Mo. App. 660; Hansberger v. Railroad, 43 Mo. 196; Kansas City v. Hart, 60 Kan. 684; Railroad v. Wyler, 158 U. S. 285. (2) The plaintiff should not have been permitted to recover under an instruction stating that the defendant would be liable in case of the existence of the defect, if it knew or should have known thereof, in the absence of evidence showing knowledge or duty to know. Marr v. Bunker, 92 Mo. App. 651. (3) Under the evidence in this case, the court erred in giving the plaintiff's second instruction that it was the duty of the defendant to use every precaution which was accessible to insulate these wires at the point where the accident occurred. Geismann v. Electric Co., 173 Mo. 678. (4) The court erred in refusing the defendant's third instruction to the effect that if the defendant used the best insulation procurable for the purpose; that it had been there such a length of time that men familiar with the business would not have expected it to have deteriorated and that it was in fact in good condition; and that the injury occurred because of a concurrence of special circumstances not reasonably to be expected, plaintiff could not recover. Skipton v. Railroad, 82 Mo. App. 134; Graney v. Railroad, 157 Mo. 683; Fuchs v. St. Louis, 167 Mo. 620; Kane v. Falk Co., 93 Mo. App. 209. (5) The plaintiff, by his own testimony, was guilty of contributory negligence, which was therefore a question for the court, and the peremptory instruction for the defendant should have been given. Poindexter v. Paper Co., 84 Mo. App. 352; Harff v. Green, 168 Mo. 308; Davies v. Railroad, 159 Mo. 7; Roberts v. Telephone Co., 166 Mo. 384; Holding v. St. Joseph, 92 Mo. App. 143.

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I. N. Watson and *D. W. Brown* for respondent.

(1) If there was a variance between the cause of action alleged and the evidence introduced it was waived by defendant. It should have proceeded as provided in section 655, Revised Statutes 1899, and filed an affidavit as therein required. Olmstead v. Smith, 87 Mo. 602; Ridenhour v. Railroad, 102 Mo. 270; Bank v. Leyser, 116 Mo. 51; Howard Co. v. Baker, 119 Mo. 406. (2) There was no variance because the petition stated a good common law action for negligence leaving out the ordinance. In short, the ordinance is but declaratory of the common law duty to properly insulate wires carrying such dangerous currents of electricity. Eliminate the ordinance and the petition states a good cause of action at common law. Anderson v. Railroad, 161 Mo. 411; Geismann v. Electric Co., 173 Mo. 654. (3) The court committed no error in giving plaintiff's first instruction. There was ample evidence to support same. (4) Appellant contends that plaintiff's second instruction erred in telling the jury, "that it is the defendant's duty to use every precaution which was ascessible to insulate its wires or wire at that point." Geismann v. Elec. Co., 173 Mo. 670; McLaughlin v. Elec. Co., 34 L. R. A. 812. (5) Plaintiff was not guilty of contributory negligence as a matter of law. Geismann v. Elec. Co., supra; McLaughlin v. Elec. Co., 100 Ky. 173, 34 L. R. A. 812.

ELLISON, J. — Plaintiff instituted his action against defendant for damages resulting to him by reason of coming in contact with one of defendant's electric wires. The judgment was for plaintiff in the trial court.

It appears that plaintiff was on what is known as a swinging scaffold hung down beside the brick wall of a building and was engaged, with a trowel and mortar, in repointing the wall. The defendant's wires

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were stretched on poles along near the wall and were about twenty feet from the ground. Plaintiff came in contact with one of the wires and received such a shock as to render him unconscious. He was also burned about the hand, arm, shoulder and hip.

1. It is urged that the following instruction was erroneous in not restricting defendant's duty to use every "reasonable" precaution which was accessible. The point being that by omitting the word "reasonable," the court held defendant too strictly, viz.: "The court instructs the jury that if you find that at the time and place in question, the plaintiff was in a place where his business required him to be, and where he had a right to be, and if the defendant knew, or by the exercise of ordinary care would have known, that persons were liable to come in contact with its wire or wires in the performance of their duties, if you find persons were liable to come in contact with said wire or wires in the performance of their duties, then it was its duty to use every precaution which was accessible to insulate its wire or wires at that point, and at all points where the plaintiff would have the right to go to attend to his business, and to use the utmost care to keep them so, and, for personal injuries, if any resulting from its failure in that regard, it is liable in damages."

There are various degrees of care required in different jurisdictions with reference to the various dangerous appliances and methods now in use. In some courts it is held, even as to such exceedingly dangerous appliances as electricity, that "ordinary care," or, "reasonable care," is what is required. While in others an extraordinary degree of care is required. That is to say, something more than mere reasonable care. The case of Geismann v. Missouri Electric Co., 173 Mo. 654, 678, undoubtedly puts this State with the latter class, for it is there expressly said that the law requires more than keeping the wires reasonably safe.

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But in consideration of the extended discussion of the Geismann case and the conflicting views which counsel have taken of it, and the binding obligation on this court of what is there said, we will state our understanding of the rule there laid down. The particular part of the opinion discussed is the following paragraph: "It follows from these authorities (which the court had just reviewed) that it was defendant's duty, in the first place, to use every protection which was reasonably accessible to insulate its wires at the point of contact or injury in this case, and to use the utmost care to keep them so, and the fact of the death of Geismann is conclusive proof of the defect of the insulation and negligence of the defendant, and as to whether he was guilty of contributory negligence or not was a question for the jury."

In our opinion the rule established by that decision is that the utmost degree of care (more than ordinary care) should be used both in insulating the wires and in keeping them insulated. When the court uses the expression in the first part of the paragraph, "reasonably accessible," it was meant, reasonably, in view of the extraordinarily dangerous appliance. In dealing with some ordinary appliance, only ordinarily dangerous, much less effort would be considered a reasonable effort than if the appliance was one of the most dangerous, deceptive and destructive known. So when the court said that every protection "reasonably accessible" must be used in the first place in protecting the wires, and the "utmost care should be used to keep them so," the two expressions should be taken to mean the same thing—a statement of the same matter in different words. For, considering the noiseless, hidden and destructive power of electricity, a reasonable effort to control it is nothing short of the utmost effort—nothing less than the utmost would be a reasonable effort. That the court did not intend the word, "reasonably," to mean anything different from the words,

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"utmost care," is further evidenced by the fact that it had just quoted approvingly from McLaughlin v. Louisville Electric Light Co., 100 Ky. 173, where it was laid down, in express terms, that those maintaining electric wires should have them so insulated that they would be, not reasonably, but *absolutely,* free from danger; and to that end should have had *perfect* insulation, and the fact that such character of insulation was very expensive or inconvenient was no excuse.

We therefore hold it to be the duty of those who maintain such appliances to use the utmost care to thoroughly insulate the wires and to keep them so insulated.

2. Furthermore, the rule laid down in the McLaughlin case by necessary implication conclusively assumes that if an injury results from contact with the wire that the person in care of the wire has not had it, or has not kept it, perfectly insulated, and therefore that he has been negligent. In that case an instruction was asked by the plaintiff reading: "The injury to the plaintiff is conclusive proof of the defective insulation and of the negligence of the defendant." And the court said, in effect, that in view of what it had written, the instruction became unimportant. But in Clements v. Electric Light Co., 44 La. Ann. 692, the statement made in that instruction is expressly stated to be the law. The rule laid down in those cases is adopted by the Supreme Court in the Geismann case.

We, therefore, hold that the fact that plaintiff was hurt by his contact with the wire is conclusive evidence that it was not perfectly insulated and that thereby the utmost care had not been exercised and that defendant was guilty of negligence. The authorities referred to assume that perfect insulation may be had and that the utmost care will provide it and thereby make the wires safe. [Perham v. Portland Electric Co., 33 Oregon 451, 477.]

3. It was not said in the Geismann case, and we,

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of course, do not say, that if the insulation of the wires was perfect and was kept so, that a sudden breaking or disrupting of the insulation by an unforeseen accident, such, for instance, as some heavy weight falling upon the wire, and an injury following before the owner could learn of it or repair the wire, that liability would follow. But the cases referred to and the case at bar were not of that kind.

4. Notwithstanding the strict rule thus applied, there would be no liability where the complaining party has himself been guilty of negligence contributing to the injury. In the present case the plaintiff was where he had a right to be and the question of his negligence was fully submitted to the jury under proper instructions; and the evidence justified a finding in plaintiff's favor on that head.

5. It is suggested that the cause of action was grounded on a city ordinance. That the petition declared on the ordinance regulating electric wires and that no ordinance was introduced in evidence. But notwithstanding the ordinance (with its terms and requirements) was pleaded, yet rejecting such portions of the petition there was a good action at common law remaining. In such case the petition will be held to support the action as developed by the evidence. [Geismann v. Electric Co., supra; Anderson v. Railroad, 161 Mo. 411.]

The conclusion we have stated necessarily disposes of the points made against the judgment and it will be ordered affirmed. All concur.

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CHARLES HENMAN, Appellant, v. FERDINAND WESTHEIMER et al., Respondents.

Kansas City Court of Appeals, February 6, 1905.

1. **INJUNCTION: Judgment: Execution Sale.** As a general rule in Missouri an injunction will not lie to restrain an execution sale of land under a void judgment.

2. ———: ———: ———: **Oral Testimony.** But where the invalidity of the judgment is not apparent upon the record and such defect must be proved by extrinsic evidence—especially oral testimony—the sale will cast such a cloud that a court of equity will prevent it.

3. **JUSTICES' COURTS: Docket Entries: Judgment: Jurisdiction.** The failure of a justice to enter in his docket the date of the issue of the summons and of the return day, and that after service the justice waited three hours after the time specified for the appearance of defendant, and fails to show that the judgment was entered in defendant's absence on default, and certain other omissions, and merely shows that no evidence was heard, are mere irregularities and do not reach the court's jurisdiction.

4. ———: **Judgment: Jurisdiction: Summons: Evidence: Injunction.** A justice cannot obtain jurisdiction of a person without due process, and where the constable changes the return day in his writ the justice acquires no jurisdiction and the judgment is void, but such defect can only be shown by parol evidence, and a sale of land under execution will cast a cloud on the title that may be prevented by injunction.

Appeal from Buchanan Circuit Court.—*Hon. H. M. Ramey,* Judge.

Reversed and remanded (*with directions*).

Samuel S. Shull for appellant.

(1) The constable had no right or lawful authority to tamper with the writ or summons issued by the justice. Even the justice who issued the writ

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could not make such a change after it left his hands. Trigg v. Ross, 35 Mo. 165; 1 Freeman on Executions (3 Ed.), sec. 47; Cope v. Snider, 99 Mo. App. 498. (2) Where a mode of acquiring jurisdiction differing from that of the common law is prescribed by statute, nothing less than an exact and rigid compliance with that statute will confer jurisdiction. Harness v. Cravens, 126 Mo. 233; Chamberlain v. Blodgett, 96 Mo. 482; Corrigan v. Schmidt, 126 Mo. 304; Skelton v. Sackett, 91 Mo. 377. (3) As it took evidence to show the spoliation of the summons, and as it took evidence to show that the person designated as "M. Henman" was no other than Michael Henman, that there was no "M. Henman" and that there was a Michael Henman and that it was he the Westheimer defendants were after in the justice court, this was a case for evidence and for equitable relief. The justice record after reciting that service was made by leaving a true copy, etc., with a member of defendant's family over the age of fifteen years, etc., goes on to say that "it appearing from the return of the officer that the defendant was duly served by process as the law directs." Now the summons and the officer's return are proper evidence in such cases to dispute such recitals and are proper evidence in this case. They show the defendant was not properly served with process. (4) Where judgment is void for want of jurisdiction over defendant, the courts are not loath to enjoin the judgment on proper proceedings in equity. High on Injunctions, secs. 228, 229; Black on Judgments, sec. 376; Railroad v. Schoenich, 144 Mo. 149.

Street, Easton & Corby for respondent.

(1) "If the judgment of the justice is void, then will the execution issued thereon be void also, and equity will not interfere to do a nugatory act. The remedy of the plaintiff is ample and adequate at law, and

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this prevents the interposition of a court of equity." Railroad v. Reynolds, 89 Mo. 146; Railroad v. Hoereth, 144 Mo. 149; Railroad v. Lowder, 138 Mo. 533; Howlett v. Turner, 93 Mo. App. 24; Benton County v. Morgan, 163 Mo. 661; Sayre v. Tompkins, 23 Mo. 443; High on Injunctions, secs. 89, 125; 2 Story's Eq. Jur., sec. 898; Russel v. Lumber Co., 112 Mo. 40; Good v. Merkowitz, 35 Mo. App. 658. (2) An injunction will not lie to stay an execution sale simply on the ground that it will pass no title and may cast a cloud on the t-ue owners's title. Drake v. Jones, 27 Mo. 428; Kuhn v. McNeil, 47 Mo. 389; Witthaus v. Bank, 18 Mo. App. 181.

BROADDUS, P. J.—This is a proceeding by injunction to retain defendants from selling certain real estate under execution.

The defendants had obtained judgment against Michael Henman before a justice of the peace, which judgment, upon certificate of the constable that no personal property of defendant could be found, was certified as usual under the statute; whereupon, the clerk of the circuit court issued an execution which was placed in the hands of the sheriff, one of the defendants herein who levied upon certain land of plaintiff which the latter had purchased from said Michael Henman after said judgment had become a lien thereon, and after said sheriff had advertised the property for sale to satisfy the same. This judgment of the justice was rendered on the 17th day of December, 1900.

The plaintiff relies upon the following allegations, viz: That the docket of the said justice fails to show when any summons or process was issued against said Michael Henman in said cause; that it fails to show the return day of such summons or process; that it fails to show the date said summons was made returnable; that said summons was not served upon said Henman; that the same as issued was made returnable on the

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14th day of December, 1900, and that the constable changed said date to the 17th day of said month and year; that said docket fails to show that upon the return of the summons served that the justice waited three hours after the time specified in the same for the appearance of defendant; that it does not show that judgment was entered against defendant in his absence or that he made default; that it shows that no evidence was heard in the cause; and that no evidence in fact was heard. It is further alleged that the name of defendant in said cause was not M. Henman; and that there was no complaint or demand filed in said cause to show that the defendant owed plaintiffs therein any debt.

The court on the conclusion of the evidence dismissed plaintiff's bill and he appealed.

Plaintiff asserts, and defendants admit, that the judgment upon which the execution was issued was void in law. Defendants cite the following cases to support their contention that injunction will not lie to restrain a sale of land under an execution issued upon a void judgment, viz: [Railroad v. Reynolds, 89 Mo. 146; Railroad v. Hoereth, 144 Mo. 136; Railroad v. Lowder, 138 Mo. 533; Howlett v. Turner; 93 Mo. App. 20; Benton County v. Morgan, 163 Mo. 661; Sayre v. Thompkins, 23 Mo. 443; High on Injunction, secs. 89, 125; 2 Story's Eq. Jur., sec 898; Russell v. Interstate Lumber Co., 112 Mo. 40; Good v. Merkowitz, 35 Mo. App. 658.] And it must be admitted that as a general rule the law is well settled in this respect in Missouri.

But plaintiff contends that where the proof requisite to establish the fact that a judgment is void rests outside of the record the rule is different, and an injunction in such case is the proper remedy. It has been held that when the opposite party can claim title only through the record, and there is no defect apparent on the record but such defect must be proved by extrinsic evidence, particularly if that evidence depends

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upon oral testimony to establish it, there is a cloud upon the title and a court of equity may be invoked to remove it. [Clark v. Ins. Co., 52 Mo. 272.] In Verdin v. St Louis, 131 Mo. 78, Judge BURGESS in his opinion said: "The taxbills, although illegally issued, were a cloud upon plaintiffs' title and rendered the property unsaleable in the market. No one would have purchased or advanced money upon the property with the taxbills against it even though they were void, as the defects in the proceedings previous to their issue, were such as to require legal acumen to discover them, and whether they appear from the face of the proceedings, or by extrinsic evidence, courts of equity will entertain jurisdiction to remove the cloud." But this opinion was not concurred in by a majority of the judges. It appears that the difference in that case arose over the "legal acumen doctrine," and also as to whether a court of equity would afford relief to remove a cloud upon title when it appeared that the proceedings were void upon its face. It seems therefore that the question was not fully determined by the court in that case.

In Clark v. Ins. Co., supra, although asserting that equity would interfere to remove a cloud upon title where it required extrinsic evidence to show the defect through which the opposite party claimed title, the general doctrine that equity would not interfere in such cases where the defect was apparent of record, was also recognized. This case was afterwards approved in Harrington v. Utterback, 57 Mo. 519; Beedle v. Mead, 81 Mo. 297; Mason v. Black, 87 Mo. 329; Colline v. Johnson, 120 Mo. 299; Railroad v. Nortoni, 154 Mo. 142; Rogers v. Bank, 82 Mo. App. 377; Smith v. Taylor, 78 Mo. App. 630. The rule is well settled that whereas a court of equity will not interfere to remove a cloud upon title where the defect is apparent on the face of the record, yet it will do so where it requires extrinsic evidence to establish such defect.

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The matters complained of which are alleged as making the proceedings void are as follows, viz:

That the docket kept by the justice who rendered the judgment fails to show when any summons or process was issued against Michael Henman (the defendant in the proceedings); that it fails to show the return day of such summons; that it fails to show the date said summons was issued and delivered to the constable, and was made returnable; that it fails to show that upon return of summons duly served, the justice waited three hours after the time specified in said summons for the appearance of defendant; that it does not show that judgment was entered against defendant in his absence and that he made default; and that it shows that no evidence was heard when the cause was presented. These are matters which are shown by the justice's record. Other matters are not shown by the record, to-wit: That the constable changed the return day of the summons; that the name of the defendant was not M. Henman, but Michael Henman; that no complaint was ever filed in said cause; that no summons was served upon the defendant Michael Henman.

Section 3844, Revised Statutes 1899 provides that certain entries shall be made by every justice of the peace upon his docket, among which are the following: "the time when the first process was issued against defendant; the time when the parties appeared before him; and the time when the trial was had." The question therefore arises whether the failure of the justice to enter upon his docket the date when the summons was issued; that he waited three hours after the time specified in the summons to defendant for appearance before he rendered judgment; the time when the parties appeared and the time when the trial was had would have the effect to render the judgment void? It has been held that a justice's judgment is defective where the docket entries fail to show the defendant's appearance or due service of summons, but this defect may be

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remedied by producing the summons which shows due service. [27 Mo. App. 477.] It was also held that a judgment entry may be either aided or impeached in that manner. [Cloud v. Pierce City, 86 Mo. 37, and Blodgett v. Schaffer, 94 Mo. 652.] But the omissions we have been speaking of are regarded as mere irregularities. Section 4031, Revised Statutes 1899, provides that no such irregularities shall render a judgment invalid. It follows therefore that plaintiff was not entitled to the relief sought by reason of the failure of the justice to make any of the docket entries or making any such entries complained of. And it is equally clear that the allegations of a failure of the justice after return of service of summons to require of the plaintiff in said cause to file some statement of his demand, and his failure to make certain other entries on his docket must be treated as mere irregularities also.

On the other hand, it must be conceded that the justice could not obtain jurisdiction over the person of Henman without due process. It is admitted that the constable changed the return day in the summons served on the defendant from the 14th day of the month until the 17th day thereof. Jurisdiction of a justice must be shown by process or appearance, or the proceedings are void. [Bersch v. Schneider, 27 Mo. 101.] Although the justice's docket here shows that process was duly made, the facts as stated show that such service was by a void summons. Service of a void summons was equivalent to no service; and as the defendant did not appear, the proceedings were *coram non judice*.

As this matter could only be shown by oral evidence, the case falls within the rule that equity will interfere to remove a cloud upon the title of plaintiff's land or to restrain defendants from making a sale, the effect of which will be to create such cloud. The cause is reversed with directions to the trial court to

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enter up judgment perpetually restraining defendants from selling plaintiff's land as described in his petition.

All concur.

NEWT BLACK, Appellant, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Respondent.

Kansas City Court of Appeals, February 6, 1905.

1. **RAILROADS: Consolidation: Liability.** If two railroads consolidate under section 1059, Revised Statutes 1899, the consolidated company assumes the liabilities of the consolidating companies.

2. ——: ——: **Pleading: Railroad and Railway.** In a pleading where a certain company is called interchangeably "railroad" and "railway" and there is no evidence that there is both a "railroad" and a "railway" company of that name, the terms "railroad" and "railway" are not used descriptive of the distinct corporation, but as descriptive of the thing meant and synonymously.

3. ——: ——: **Lease.** A lease of one railroad to another for a term of 99 years is to all intents and purposes a merger of the two companies.

4. ——: ——: **Evidence.** Evidence that a certain line of road was included in a certain consolidation of railroad under a given lease is held to be too uncertain and insubstantial to sustain a verdict,' and an error in permitting a witness to state that it belonged to a certain other railroad company is held harmless.

Appeal from Barton Circuit Court.—*Hon. H. C. Timmonds,* Judge.

AFFIRMED.

G. H. Walser for appellant.

(1) The Kansas City, Ft. Scott & Memphis Railway Co. had the power to lease its road to the defendant and turn the management over to defendant according

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to the terms of the lease. R. S. 1899, secs. 1061, 1081. (2) The Kansas City, Fort Scott & Memphis Railway having been leased to the defendant, and according to the terms of the lease the defendant having taken control of same and operated same to the exclusion of the out going company it became liable to the obligations of the old company. R. S. 1899, sec. 1059; Kinion v. Railroad, 39 Mo. App. 382; Kinion v. Railroad, 39 Mo. App. 574; Evans v. Bank, 79 Mo. par. 4, p. 186; Thompson v. Abbott, 61 Mo. 176; Hughs v. School Dis. No. 29, 72 Mo. 643; State ex rel. v. Green Co., 54 Mo. 540. (3) Although it may be that defendant only had a trackage right over the line from Arcadia, Kansas, but leased right from Arcadia to Kansas City. The delay at Fort Scott, Olathè and other points between Arcadia and Kansas City will make defendant liable. Cherry v. Railroad, 61 Mo. App. 303.

L. F. Parker, E. P. Mann and *J. T. Woodruff* for respondent.

(1) It is very clear that the evidence here does not make out a consolidation as contemplated by this statute. On the contrary, the showing is that the defendant is in partial possession of the road formerly operated by the Kansas City, Fort Scott & Memphis Railroad Company, under a lease, not made by the Kansas City, Fort Scott & Memphis Railroad Company, the company against whom plaintiff makes complaint, but from another company, the Kansas City, Fort Scott & Memphis Railway Company. So the only inference to be drawn is that the company who executed the lease must, in some way or other, have acquired a right to the property from the railroad company which entered into the contract of shipment. (2) The whole evidence, and the inferences to be drawn from it, flatly contradict the idea of a consolidation under the statute, so we take it that the court, so far as this statute is concerned, was

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perfectly right in sustaining the demurrer on the ground that the plaintiff did not offer sufficient evidence, or any evidence, that the defendant was liable for the damages complained of by reason of any consolidation. (3) If we should go still further, and assume that the defendant had leased the railroad over which the shipment was made, from the company operating it at the time the transaction was had, this would not, of itself, constitute a consolidation, or impose a duty upon the lessee to pay the debts, or satisfy the demands for the torts of the lessor. 6 Am. & Eng. Enc. of Law, 806; Pullman v. Railroad, 115 U. S. 596; Balsley v. Railroad, 119 Ill. 68, 59 Am. Rep. 787; State v. Vanderbilt, 37 Ohio St. 638.

BROADDUS, P. J.—The plaintiff seeks to recover damages from the defendant for the alleged failure of the Kansas City, Fort Scott & Memphis Railroad to carry certain cars of cattle from Liberal to Kansas City, Missouri, with proper dispatch, which failure it is alleged resulted in their depreciation in value and their arrival in a declining market. It was shown that said transaction was had with said mentioned railroad company on March 18, 1901. The petition was filed May 28, 1903. The first count alleges that in 1901 the Kansas City, Fort Scott & Memphis Railway Company became merged with the St. Louis & San Francisco Railroad Company, by means of which the two roads were consolidated into one company under the name of the latter. The allegations of the second count are substantially the same as in the first count. In order to show the alleged consolidation, plaintiff introduced a paper purporting to be a lease for ninety-nine years from the Kansas City, Fort Scott & Memphis Railroad Company to the defendant of its connecting railroad line. This connection includes the line of the Kansas City, Fort Scott & Memphis Railroad Company from Liberal, Missouri, to Arcadia, Kansas. The remainder

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of its line is located in Kansas until it reaches Kansas City. The plaintiff also introduced the station agent at Liberal, who testified that prior to October 1, 1901, he had been employed by the Kansas City, Fort Scott & Memphis Railroad Company and since that date by the defendant. Other evidence was introduced by plaintiff to sustain his cause of action but as it is practically agreed that the court sustained a demurrer to plaintiff's evidence and instructed the jury to find for the defendant on the ground that plaintiff had not shown the merger and consolidation of the two companies, including the line from Liberal, Missouri, to Arcadia, Kansas, it will be unnecessary to consider that part of the case.

Section 1059, Revised Statutes 1899, provides as follows: "Any two or more railroad companies in this State existing under either general or special laws and owning railroads constructed wholly or in part which when completed and connected in the whole or in the main, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controling such continuous line of road with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the State or otherwise which belonged to or rested upon either of the companies making such consolidation," etc. Under this provision of the statute if the consolidation had been established the defendant assumed the liabilities of the said Kansas City, Fort Scott & Memphis Railroad Company, including that of the plaintiff. But it seems that the court held that the consolidation had not been shown.

The petition in the first place alleges that the shipping contract was made with the Kansas City, Fort Scott & Memphis *Railroad* Company, but in the second place alleges that the merger or consolidation was between defendant company and the Kansas City, Fort Scott & Memphis *Railway,* the difference between the

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designation of the two allegations consisting in the use of the word *railway* in the latter instance instead of the word *railroad* as used in the first instance. The contention of the defendant is that the words "railroad" and "railway" are words descriptive of the corporations, therefore, the Kansas City, Fort Scott & Memphis Railroad Company and the Kansas City, Fort Scott & Memphis Railway Company are two distinct corporations. We do not think so. The words are synonymous. They are so used and signify the same thing; and are only descriptive of roads having a bed with ties and rails and other appurtenances over which are propelled cars by steam or other kind of motive power from place to place and in contradistinction to other roads or highways. There is no evidence going to show that there are two distinct railroad corporations—one denominated the Kansas City, Fort Scott & Memphis Railroad Company and the other the Kansas City, Fort Scott & Memphis Railway Company—and in the absence of such showing the presumption is that they are one and the same.

The lease in question was between the defendant and the Kansas City, Fort Scott & Memphis Railroad Company and being for a term of ninety-nine years was to all intents and purposes a consolidation or merger of the two companies. The former was a corporation existing under the laws of Missouri, and defendant was a corporation existing under the laws of the State of Kansas, but both owning at the time of consolidation lines of railroad in this State. In the former opinion we held that the consolidation of the two companies formed a continuous line from Liberal to near the State line at Arcadia, in Kansas, at which last-named point defendant's railroad extended. A motion for rehearing was filed and sustained and the cause was resubmitted for further consideration.

An examination of the purported lease or act of consolidation shows that the defendant obtained con-

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trol of, "a line of railroad extending from Kansas City, Mo., in a general southerly direction, by way of Fort Scott, Washburn, Columbus and Baxter Springs, Kansas, and Miami, Indian Territory, to Afton in the Indian Territory." And, "a line of railroad commencing at a point on the aforesaid line of railroad described in the preceding subdivision at Washburn, Crawford county, Kansas, and extending thence in a general southeasterly, southerly and southwesterly direction, by way of Arcadia, Pittsburg and Parsons, Kansas, to Cherryvale in Montgomery county, Kansas. And in all other lines of railroad owned at the time of the execution and delivery of this indenture by the lessor, and the right, title and interest of the lessor in and to other lines of railroad in which the lessor by lease, trackage agreement or operating contract, now has any right, title or interest." This description does not show any line in Missouri of the lessor connecting with defendant's line of railroad at Arcadia, Kansas. It may have been that there was such a line but the evidence did not so show. The evidence of Diamond, the station agent, went to show that formerly the said lessor was operating that part of a railroad from Liberal to Arcadia, Kansas, and that it was then being operated by the defendant. But his evidence fails to show that the Kansas City, Fort Scott & Memphis Railroad Company had any interest in that part of the line. And there is no evidence that defendant is operating the same by virtue of the act of consolidation of the railroad lines of the two companies.

It is to be inferred from the evidence that defendant had some trackage arrangement over the railroad from Liberal to Arcadia, but the evidence tends to show that such arrangement, if it existed, was with the Kansas City, Clinton & Springfield Railroad Company, the supposed owner of the railroad between the two points named. The witness, Diamond, stated that such was the fact. Plaintiff objected to the introduction of this

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statement but his objection was overruled by the court. The objection should have been sustained as that was not the proper manner of proving ownership in such instances. The plaintiff's evidence that the consolidation included the line from Liberal to Arcadia was too uncertain and unsubstantial upon which to base a verdict; therefore, said error did not operate to his prejudice as he had no case on his own showing.

With this view of the case it is immaterial whether or not the purported lease was such in fact, or that it was substantially an act of consolidation under the statute; in which latter event defendant would be liable for the obligations of the contracting company, the Kansas City, Fort Scott & Memphis Railroad Company.

Cause affirmed. All concur.

LYMAN S. CURRY, Appellant, v. ALVA WHITMORE, Respondent.

Kansas City Court of Appeals. February 6, 1905.

1. **REAL ESTATE BROKER: Commission: Evidence: Jury.** Where a real estate broker produces a purchaser ready, able and willing to consummate a sale he has earned his commission; and on review of evidence showing a somewhat unusual manner of collecting the commission so that the vendee assumes the same, without understanding the object thereof, it is held sufficient to send the question of the vendee's assumption to the jury, though the sale in fact did not occur by reason of the vendor's default.

2. **———: ———: Homestead: Failure to Complete.** The fact that the land sold is a homestead and the wife refuses to join in the deed, will not relieve the landowner from liability to pay the commission when earned by the broker.

Appeal from Linn Circuit Court.—*Hon. John P. Butler,* Judge.

REVERSED AND REMANDED.

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West & Bresnehen and *Crawley & West* for appellant.

(1) Under either showing of facts Curry paid the amount of the note to Guest for Whitmore, and Whitmore received credit for it and agreed to repay it. Every principle of law that would hold Whitmore to his contract under one statement of the facts would hold him under the other; so we can see no possible reason why the same result should not follow, and the judgment of the trial court be reversed and the cause remanded for a new trial. (2) The homestead law has no more to do with this case than has the law of gravitation; and learned counsel for respondent has labored in vain if he thought for a moment any member of this court or counsel for appellant would consider seriously his insistence on that proposition.

A. W. Mullins for respondent.

(1) The contract made by Charles Guest to the defendant was signed by Charles Guest only; his wife Mary Guest was not a party to it. The land so contracted was the homestead of said Charles Guest, his wife and their family of children. R. S. 1889, sec. 3616. And the plaintiff's contention is that the $1,100 he alleges was to be paid by defendant to plaintiff was a part of the purchase price of the land. Such payment would have been wholly without consideration, even if there had been any contract or agreement between them that defendant should make such payment. Davis v. Watson, 89 Mo. App. 15; Pursley v. Good, 94 Mo. App. 382; Pershing v. Canfield, 70 Mo. 140; McLeod v. Snyder, 110 Mo. 298; Mastin v. Grimes, 88 Mo. 490; Wellman v. Dismukes, 42 Mo. 101; Dietrich v. Franz, 47 Mo. 85. (2) The court, at the close of all the evidence, properly instructed the jury to make their verdict for defendant. If it had been possible for the plaintiff to have obtained a verdict in his favor from the jury, then

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under the pleadings and all the evidence it would have been the manifest duty of the court to have set aside such verdict. Therefore, the peremptory instruction of the court to the jury that the plaintiff was not entitled to recover in this action and for the jury to make their verdict for the defendant, was properly given. Bank v. Bank, 151 Mo. 320; Powell v. Railroad, 76 Mo. 82; Jackson v. Hardin, 83 Mo. 186; Reichenbach v. Ellerbe, 115 Mo. 588; Mexico v. Jones, 27 Mo. App. 534.

ELLISON, J.—Plaintiff brought this action against defendant to recover the sum of eleven hundred dollars. At the close of all the evidence the trial court gave a peremptory instruction for defendant.

Since the case went off on a demurrer we will treat it from the standpoint of the evidence in behalf of plaintiff, without regard to its being contradicted by the evidence in behalf of defendant. It appears that plaintiff and one, Guest, entered into a contract whereby it was agreed that if plaintiff would find a purchaser for Guest's farm of 110 acres in Chariton county the latter would give the former all over the price of $35 per acre which the purchaser would pay. That afterwards plaintiff produced defendant (who was ready, able and willing to buy) as a purchaser for the farm at the price of $45 per acre, which price would make due to plaintiff from Guest $10 per acre, or the total sum of $1,100. As soon as Guest came to an agreement with defendant the latter made him a cash payment of $1,000 and was to pay him the balance of $3,950 on the following first day of March, a title bond being executed by Guest.

It was then agreed between plaintiff and Guest that the former would give to Guest his note for $1,100 (the amount of plaintiff's commission) due plaintiff as commission, and that Guest would accept such note as a payment on the balance of $3,950 due him from defendant as balance of purchase-money on the farm. Defendant was then informed that his vendor, *Guest,* had

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agreed to accept plaintiff as paymaster for $1,100 and he thereupon agreed that if plaintiff paid Guest that sum for him he would pay it to plaintiff on the first of March when the balance of purchase-money was to be paid. Plaintiff did execute his note to Guest for $1,100 and Guest thereupon accepted it as a payment on the farm and indorsed on the back thereof that it was paid "as so much of the purchase price of my farm." Defendant was present when the transaction took place and agreed to it, at the same time accepting a credit on the bond for deed (which Guest gave him) of $2,100. That sum being made up of the $1,000 cash he paid himself and the $1,100 paid for him by plaintiff in the manner stated.

This sale of the land was not consummated by deed and it seems to have been agreed to be annulled by Guest and defendant. Among other reasons assigned for this was that Guest's wife refused to execute a deed. Guest and defendant then entered into another contract, ignoring plaintiff, whereby the former sold his land to the latter for a less price.

The foregoing is not the evidence in detail, but it is the substance and effect of plaintiff's showing. It undoubtedly entitled plaintiff to have the case submitted to the jury.

It is true that the agreement between plaintiff and Guest whereby the former gave his note to Guest for $1,100, the amount of his commission, and Guest immediately cancelling it by indorsing on it that it was a payment of so much of the purchase price on the land and handing it back to plaintiff, was rather odd, unusual and indirect, yet, things represented which are unusual and indirect are not necessarily untrue. It is probable that that agreement between Guest—the owner of the land—and plaintiff—his agent—to sell it, was intended as a means of plaintiff collecting his commission out of the balance of purchase money yet to be paid, and of preventing defendant from knowing

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that he was paying for the land ten dollars per acre more than Guest was willing to take for it. But that would not alter the legal rights of the parties. The contract between Guest and plaintiff whereby the former agreed to pay the latter all over a certain price per acre was a valid contract. And when plaintiff produced defendant to Guest ready, able and willing to buy, and the failure to consummate the sale came about, not by plaintiff's fault, but through a refusal of Guest —or his wife—to sign a deed, Guest's liability to plaintiff became fixed.

It is, however, said by defendant that the land was Guest's homestead and that he could not sell it without his wife's consent. Neither can a husband sell any of his other lands and make perfect title without his wife's consent. But neither of these conditions will relieve him of liability on his contract for the sale of such lands. That is a matter he should think of and provide against at the time he enters into his obligation.

The judgment will be reversed and the cause remanded.

All concur.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant, v. A. M. WOODSON, Judge, etc., Respondents.

Kansas City Court of Appeals, February 6, 1905.

1. **JURISDICTION: Party: Special Appearance: Revival of Action.** Where the circuit court has jurisdiction and orders a cause revived in the name of the plaintiff's administrator, the voluntary appearance of the defendant gives the court jurisdiction over the parties but the defendant has the right by special appearance to test the jurisdiction of the court and such appearance may not be construed into a general appearance.

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2. **ACTION: Suggestion of Death: Revival: Scire Facias.** On suggestion of the plaintiff's death when the defendant does not enter his voluntary appearance, the court can only enter the suggestion and order a *scire facias* to revive the cause.

3. ———: ———: ———: **Limitation: Abatement.** Where three terms have expired since the suggestion of plaintiff's death without a *scire facias*, the action abates as to the deceased party and the interest of his representatives.

4. ———: ———: ———: ———: **Attorney and Client.** When the plaintiff dies his attorney has no power to suggest his death and such suggestion is insufficient to set in motion the special limitation requiring a revival within three terms of the court; such action must come from the administrator.

5. **PROHIBITION: Other Remedy.** Where no error has been committed that cannot be adequately reached by ordinary procedure, prohibition will not lie.

Original Proceedings by Prohibition.

WRIT DENIED.

Brown & Dolman for appellant.

(1) Sections 756-758 and 761, R. S. 1899: "Where the plaintiff in the suit dies the administrator can be substituted in his place, only by voluntary appearance of the defendant or by service upon him of a *scire facias*. To enter the appearance of the administrator and give judgment against defendant without such appearance or *scire facias* is erroneous." Harkness v. Austin, 36 Mo. 47; Ferris v. Hunt, 18 Mo. 480; Fine v. Gray, 19 Mo. 33; Crawford v. Railroad, 171 Mo. 77; Farrell v. Brennan, 25 Mo. 88. (2) There can be no revivor in this case. The provision of section 761 "is in the nature of a special statute of limitations and after the expiration of the period limited there can be no *scire facias* and consequently no revivor." Mathewson v. Railroad, 44 Mo. App. 98; Rutherford v. Williams, 62 Mo. 254; Gallagher v. Delargy, 57 Mo. 29. (3) The statute is imperative and provides that the

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suit shall be dismissed unless the law has been complied with. Any order that the court might make after the expiration of the time looking to the further prosecution of the suit would bind the same. Doering v. Kenamore, 36 Mo. App. 150.

C. F. Strop and *Elliot Spalding* for respondents.

(1) The writ issued herein should be quashed because prohibition never lies where the thing complained of can be cured by writ of error or appeal, and plaintiff's motion to set aside the order of circuit court having been overruled by that court, a perfect remedy by appeal existed. Wand v. Ryan, 166 Mo. 646; State v. Heige, 39 Mo. App. 49; State v. Laughlin, 7 Mo. App. 529; State v. Wood, 155 Mo. 425; State v. Anthony, 65 Mo. App. 543; State v. Railroad, 100 Mo. 59; State v. Withrow, 108 Mo. 1. (2) Until the inferior court has been asked in some form and without avail to dismiss the same, a superior court will not entertain an application for a writ of prohibition. Barnes v. Gottschalk, 3 Mo. App. 111; State v. Laughlin, 9 Mo. App. 486. (3) Defendants do not dispute the proposition that in the absence of a voluntary appearance a cause can not be revived without a *scire facias*, but an entry of appearance waives the service of summons. The fact that plaintiff herein appeared and moved the circuit court to vacate its order constituted a waiver of notice or summons and an entry of appearance, and this, too, although plaintiff professed to appear for the purpose of the motion only. As directly in point and controlling, see Ferris v. Hunt, 20 Mo. 464. (4) The provision of the statute requiring a dismissal after three terms has no application until after three terms have elapsed after the appointment of the executor, in other words this is a special statute of limitation which runs only from the time of the appointment of executor. Expressly in point controlling, see Prior v. Kiso, 96

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Mo. 314. (5) Even though plaintiff was entitled to notice before an order of revival was entered, the executor had the undoubted right to suggest the death of his testator and to enter his appearance as preliminary to suing out a *scire facias* and that was all that was done herein.

JOHNSON, J.—This is an original proceeding in this court to obtain a writ of prohibition against the Honorable A. M. Woodson, judge of the Buchanan Circuit Court for division number one and Samuel Hassenbusch, executor of the estate of Lazarus Hassenbusch, deceased.

November 22, 1901, Lazarus Hassenbusch commenced an action before a justice of the peace of Washington township, Buchanan county, against the petitioner to recover damages alleged to have been sustained by him because of the failure of petitioner to deliver certain goods which it received as a common carrier from said Hassenbusch at St. Joseph for delivery to him at Lawton, Oklahoma. A trial followed which resulted in a judgment for the plaintiff, from which judgment the petitioner in proper time took an appeal to the circuit court of Buchanan county. A transcript of the proceedings before the justice was filed in said circuit court February 17, 1902. In July, 1902, while said cause was pending and undetermined, Lazarus Hassenbusch died leaving a will; but letters testamentary, were not issued to the executor named in the will, Samuel Hassenbusch, until December 8th, 1903. At the September, 1902, term of the circuit court before the granting of said letters testamentary the following order was entered of record:

"Comes now the *plaintiff's* attorney and suggests to the court the death of plaintiff, Lazarus Hassenbusch, plaintiff in the above-entitled cause."

At the May, 1904, term of said circuit court, with-

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out any notice to and without any appearance of the petitioner, the court made this order:

"Death of plaintiff suggested submitted to the court, evidence heard and Samuel Hassenbusch, executor, is made plaintiff and cause revived in the name of executor and by agreement of parties cause continued."

From the time of the first suggestion of plaintiff's death in September, 1902, until the making of the last mentioned order in May, 1904, four regular terms of court intervened and no summons had been issued to nor served upon the petitioner, nor did the petitioner make any appearance nor agree to the continuance, notwithstanding the recital in the order of revivor. After the entry of this order of revivor, and at the same term of court, the petitioner filed a motion to set aside said order in which it stated that it appeared for the purpose of said motion only, and for no other purpose, and challenged the jurisdiction of the court to make the order or any order reviving the cause. On the hearing of this motion the court set aside that part of the order which recited that the continuance of said cause was by agreement of parties but permitted the remainder thereof to stand.

The object of this proceeding is to obtain a writ of prohibition against the defendants to prohibit them from further proceeding with said cause and that the same be ordered dismissed. A rule to show cause why said writ should not issue was granted by one of the judges of this court in vacation, returnable to the first day of this term, and respondents were restrained from further proceedings in the meantime. The case is now before us on the petition and respondents' return. There is no controversy over any of the facts. Relief is sought by the petitioner upon two grounds:

First, that the trial court was without jurisdiction to revive the cause in the name of the executor without

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the service of a *scire facias* upon the petitioner or its voluntary appearance.

Second, the intervention of three terms of court after the suggestion of plaintiff's death deprived the court of jurisdiction to revive the cause or to order a *scire facias* to bring the petitioner into court.

It is claimed by respondents the motion to set aside the order of revivor filed by the petitioner in the circuit court, notwithstanding it expressly limited the appearance to the sole purpose of that motion and such purpose was nothing more than an attack upon the jurisdiction of the court, was in effect a general appearance for all purposes, and although made after the order of revivor was entered of record waived the service of a *scire facias* upon the defendant in that action. Undoubtedly the circuit court had jurisdiction over the subject-matter of that suit. A voluntary appearance by the defendant at that stage of the proceeding would have given it jurisdiction over the parties. [Posthlewaite v. Ghiselin, 97 Mo. 420.] But the defendant could and did limit its appearance to the specific purpose of raising the question of jurisdiction. Obviously, a party in position to do so should be free to assail the jurisdiction of a court without of necessity submitting himself to the very thing he is attempting to escape. [Evansville Grain Co. v. Mackler, 88 Mo. App. 186 and cases cited.] The case of Ferris, Admr., v. Hunt, 20 Mo. 464, relied upon by respondents, is not in conflict with this view. The appearance in that case was general without any attempt to limit it to a specific purpose.

The defendant did not make a general appearance and did not by filing its motion come under the jurisdiction of the circuit court, and as no *scire facias* was issued that part of the order entered at the May, 1904, term substituting the executor as party plaintiff and reviving the cause in his name would not if properly before us be permitted to stand. In the condition of

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the case when that order was made the court could do no more than enter the suggestion of death and order a *scire facias.* The attempt to substitute the executor as party plaintiff and to revive the cause was ex parte and unwarranted. [Section 756, R. S. 1899; Harkness, Admr., v. Austin, 36 Mo. 47; Ferris, Admr., v. Hunt, 18 Mo. 480; Fine v. Gray, 19 Mo. 33; Crawford v. Railroad, 171 Mo. l. c. 77; Murphy v. Redmond, 46 Mo. 317.]

Petitioner insists, and it is the basis for the relief herein sought, that the circuit court was entirely devoid of jurisdiction at the May, 1904, term either to enter a suggestion of death or to order a *scire facias,* for the reason that more than three terms of court had intervened after the suggestion of death entered of record at the September, 1902, term. Section 761 of the statutes requires the representatives of a deceased party to be made parties in the manner provided on or before the third term after the suggestion of death. This is a special limitation and unless such new parties are made in the time prescribed the action abates as to the deceased party and the interest of his representatives therein. [Farrell, Admr., v. Brennan, Admr., 25 Mo. 88; Rutherford v. Williams, 62 Mo. 252; Prior v. Kiso, 96 Mo. 303; Mathewson v. Railroad, 44 Mo. App. 97.]

It appears, however, from the entry made at the September, 1902, term the suggestion of death was made by "plaintiff's attorney:" that is, by the attorney of Lazarus Hassenbusch, who was then deceased. Letters testamentary were not issued to the executor until December 8, 1903. Clearly, the appearance of the attorney was unauthorized. The death of his client terminated his employment. The executor had not been appointed. The estate was without a legal representative. No one had authority to appear for it. [Prior v. Kiso, supra; Weeks on Attorneys, sec. 192; Gleason

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v. Dodd, 4 Met. (Mass.) 333.] As limitation is set to running merely by the record entry suggesting death, such entry cannot be made except upon the suggestion to the court by a party to the record or by the legal representatives of a deceased party.

We must accordingly hold the entry made at the September, 1902, term inoperative for any purpose; and the circuit court still has jurisdiction to revive the cause after service of *scire facias.*

In this case no error has been committed nor complained of that cannot be reached and adequately corrected through ordinary procedure. No reason exists for the application of extraordinary remedies. The provisional rule heretofore issued is discharged and the peremptory writ denied. All concur.

SARAH LEHNER, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, February 6, 1905.

1. **PASSENGER CARRIERS: Negligence: Pleading: Evidence: Variance: Appellate Practice.** The appellate court cannot determine which of two statements of plaintiff is to be taken as her evidence, and on the evidence and pleading summarized in the opinion it is held there is not such variance as to preclude a recovery. Bartley v. Railway, 148 Mo. 124, distinguished.

2. ———: ———: **Starting Car.** Street railways as other carriers must exercise toward passengers the utmost care of a very cautious person and should not start their cars before a passenger has a reasonable time to get off or on.

Appeal from Jackson Circuit Court.—*Hon. W. B. Teasdale,* Judge.

AFFIRMED.

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John H. Lucas for appellant.

(1) The only allegation of negligence in the petition is that the agents and servants of the defendant in charge of the car carelessly and negligently started the same with a sudden and violent jerk and lurch, thereby causing plaintiff to be injured. There is no evidence to sustain this allegation. Bartley v. Railroad, 148 Mo. 140; Pryor v. Railroad, 85 Mo. App. 379; Saxton v. Railroad, 72 S. W. 720; Portuchek v. Railroad, 74 S. W. 368. (2) There is a fatal variance between the pleading and the proof. McManamee v. Railroad, 135 Mo. 448; Raming v. Railroad, 157 Mo. 506. (3) The court erred in giving instruction numbered 1 as prayed by plaintiff. There was no evidence on which to predicate the same. Marr v. Bunker, 92 Mo. App. 651; Culbertson v. Railroad, 50 Mo. App. 556; Mateer v. Railroad, 105 Mo. 320; Evans v. Railroad, 106 Mo. 594. (4). And is misleading in submitting to the jury the negligence in starting the train of any other employee except the gripman, and of the position of the plaintiff at the time of the alleged jerk or lurch thereof. Bergeman v. Railroad, 104 Mo. 90; Culbertson v. Railroad, 140 Mo. 61; Chitty v. Railroad, 140 Mo. 76; Bradley v. Railroad, 138 Mo. 307; Best v. Merryfield, 77 Mo. App. 181; Railroad v. Dawley, 50 Mo. App. 480. (5) And in giving instruction numbered 3 asked by the plaintiff. Waddingham v. Hulett, 82 Mo. 528; Donahoe v. Railroad, 83 Mo. 565; George v. Railroad, 40 Mo. App. 433; Schlereth v. Railroad, 96 Mo. 509; Dahlstrom v. Railroad, 96 Mo. 99. (6) The court erred in refusing to give instruction numbered 9, as asked by the defendant. A precautionary instruction. Cravens v. Hunter, 87 Mo. App. 466; Comb v. Railroad, 94 Mo. App. 272. (7) The damages were and are excessive and indicate partiality and prejudice on the part of the jury. Franklin v. Fisher, 51 Mo. App. 345.

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Hunt C. Moore and *Ellison A. Neel* for respondent.

(1) There was abundant evidence to sustain the allegations of plaintiff's petition. Stuebe v. Foundry Co., 85 Mo. App. 650; Gratiot v. Railroad, 116 Mo. 466; Eichorn v. Railroad, 130 Mo. 587; Slark v. Railroad, 127 Mo. 209; Dowell v. Railroad, 115 Mo. 205; Barth v. Transit Co., 142 Mo. 549; Huhn v. Railroad, 92 Mo. 440; Lamb v. Railroad, 147 Mo. 171; Pryor v. Railroad, 85 Mo. App. 380; Grace v. Railroad, 156 Mo. 301; Wharton on Negligence, sec. 420; 2 Thompsons' Trials, sec. 1663. (2) For the purpose of such a demurrer the testimony on the part of the plaintiff should be taken as true, and every reasonable inference therefrom in plaintiff's favor should be made. Dorsey v. Railroad, 83 Mo. App. 528; Stuebe v. Iron & Foundry Co., 85 Mo. App. 640; Pauck v. Dressed Beef Co., 159 Mo. 467; Cohn v. Kansas City, 108 Mo. 387. (3) Having shown that the car was manned by, or was in the charge of the defendant's agents, employees and servants, the presumption is, that the sudden jerk was produced by those having control of its movements. Hite v. Railroad, 130 Mo. 138; Dougherty v. Railroad, 81 Mo. 329; 9 Mo. App. 478; Murphy v. Railroad, 43 Mo. App. 347. (4) The evidence did show that the car was started with an unusual and extraordinary jerk. Dorsey v. Railroad, 83 Mo. App. 542; Dougherty v. Railroad, 9 Mo. App. 478. (5) There was no variance between the pleading and the proof. Furthermore, even if it should be granted, for the sake of the argument, that there was a variance still it is no ground for reversal. R. S. 1899, sec. 655; Hansberger v. Railroad, 82 Mo. App. 574; Ridenhour v. Railroad, 102 Mo. 270; Turner v. Railroad, 51 Mo. 501; Olmstead v. Smith, 87 Mo. 607; Grace v. Railroad, 156 Mo. 302. (6) Plaintiff's instruction numbered 1 was correctly given. There was abundant evidence on which to predicate the same. Duncan v. Rail-

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road, 48 Mo. App. 662.. (7) Instruction numbered 3 asked by plaintiff was correctly given. Furnish v. Railroad, 102 Mo. 438; Freeman v. Railroad, 68 S. W. 1058; Sweeney v. Railroad, 150 Mo. 401; Grace v. Railroad, 156 Mo. 306. (8) The damages were not excessive. Franklin v. Fisher, 51 Mo. App. 345; Perette v. Kansas City, 162 Mo. 238; Hollenbeck v. Railroad, 141 Mo. 97; Zellers v. Water Co., 92 Mo. App. 107; Bertram v. Railroad, 154 Mo. 639; Merrill v. St. Louis, 12 Mo. App. 466; Gurley v. Railroad, 120 Mo. 211. And cases cited in argument.

BROADDUS, P. J.—This is a suit for damages for personal injuries claimed to have been sustained by plaintiff on the ground of alleged negligence of defendant. The petition states that on or about the 15th day of May, 1902, while taking passage on one of defendant's cable cars on Fifteenth street in Kansas City, Missouri, the plaintiff, "stepped from the ground up and on to the first step of the rear of said car; that while in the act of stepping from the said first step of defendant's said car up and on to the rear platform of said car, and before plaintiff had an opportunity or time to reach a place of safety in said car, the agents, employees and servants of defendant in charge of said car, carelessly and negligently and without warning to plaintiff, started said car with a sudden and violent jerk or lunge, violently throwing plaintiff against the back of the rear seat of defendant's said car, thereby causing plaintiff to sustain severe bruises," etc.

The answer was a general denial and alleging contributory negligence. The jury returned a verdict for $500 upon which judgment was rendered, and defendant appealed.

The principal contention by defendant is that the plaintiff did not make out a case and that its demurrer to the evidence should have been sustained. The plaintiff was the only witness on her part who testified as to

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the cause of negligence. On cross-examination she was asked: "Had the car started before it gave a sudden jerk?" To which she answered, "yes, sir." She was then asked: "Yes, and after it started it gave a sudden jerk?" To which she answered: "Yes, sir." But in her examination in chief she stated that the car was at a stand as she made the attempt to get aboard of it; that she got up on the first step and as she got up on the platform, or was in the act of stepping upon it, the car gave a jerk which had the effect of throwing her over and against the back seat of the car, whereby she was injured. She stated that the car started with a "big jerk." Again, she stated that the car "commenced to start as I got upon the platform;" also: "He (the conductor) rang the bell as I stepped upon the platform."

The defendant argues that as the evidence showed that the car gave a sudden jerk after it was in motion the evidence did not support the petition which alleged that the car started with a sudden jerk. But is this court authorized to determine which of the two statements of plaintiff is to be taken as her evidence, viz.: the one that the car was already in motion when the jerk occurred, or the one that the car started with a jerk? It seems that in so doing we would be usurping the province of the jury. And the trial court had no authority to determine that question. It was solely a question for the jury. And we are mindful of the fact that witnesses subjected to as severe a cross-examination as the plaintiff underwent from defendant's counsel may and often do make inconsistent statements; but yet, after all, an ordinary observer will have little or no trouble in determining what the witness meant from all that he said. We do not think there was such a variance between the pleading and the proof as would preclude the plaintiff from recovering.

The defendant insists that under the rule in Bartley v. Metropolitan Street Railway Company, 148 Mo.

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124, the defendant's demurrer should have been sustained to plaintiff's case. But that case is not like this either upon the facts or upon principle. In that case, the plaintiff fell from the footboard while the car was in motion, the fact being that the car gave a jerk which he claimed was the cause of his fall. But it was not shown that the jerk was anything more than might ordinarily occur because of slack in the cable. Here, however, the car was at a stand, and while plaintiff was stepping from the car step to the platform in getting on, the car was started with a sudden jerk which threw her against the back of a seat causing her injury. Upon this cause of action the plaintiff asks for a recovery of damages, and the evidence tends to sustain her pleading.

The defendant was negligent in starting the car before plaintiff had landed securely upon its platform. It is a well-established rule that a carrier must allow a reasonable time for its passengers to get off and on its cars before they are started. Street railways, as other carriers, are required to exercise towards the passengers the utmost care and diligence of very cautious persons. [Sweeney v. Cable Railway, 150 Mo. 385.] And this duty applies where a passenger is getting off or on a car. [Grace v. Railway, 156 Mo. 295.]

The damages awarded plaintiff were amply sustained by the evidence. There is nothing in other points presented by the appeal that requires discussion.

Cause affirmed. All concur.

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D. M. GRIFFIN, Respondent, v. WABASH RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, February 6, 1905.

1. **TRIAL PRACTICE: Nunc Pro Tunc Order: Motion for New Trial. Where a motion for *nunc pro tunc* order to show the filing of a motion for a new trial, shows that the the latter motion was filed in vacation, it precludes the granting of the order.**

2. **———: ———: ———. A verbal understanding between the counsel and the court can not supply a record authorizing a *nunc pro tunc* entry.**

3. **———: ———: ———: Bill of Exceptions. The recitations of a bill of exceptions in regard to filing motion for new trial will not justify the court in making a *nunc pro tunc* entry to that effect, when other entries show it not to be true.**

4. **———: Motion for New Trial: Record Proper. The filing of a motion for new trial must be found in the record proper.**

Appeal from Macon Circuit Court.—*Hon. N. M. Shelton*, Judge.

AFFIRMED.

Geo. S. Grover for appellant.

John T. Barker for respondent.

ELLISON, J.—Plaintiff instituted an action against defendant for alleged negligent delay in the shipment of a lot of cattle from Love Lake, Missouri, to Chicago, Illinois. There was a judgment for plaintiff in the trial court.

The record does not show that there was any motion for new trial or in arrest of judgment filed. The bill of exceptions, however, does recite that those motions were filed in due time at the March term, 1903,

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of the Macon county circuit court, at La Plata. Afterwards, at the November term of that court, defendant filed its motion for a *nunc pro tunc* order of record showing the filing of such motions. The trial court heard the motion and refused the order. Thereupon defendant again appealed.

It appears from defendant's motion for the *nunc pro tunc* order that the motions for new trial and in arrest were not in fact filed on March 20th, but on March 25th. It further appears from the record that the court adjourned for the term on March 21st. It further appears from the endorsement of filing made by the clerk on the back of the motions that they were filed "as of March 20th" 1903 on "March 25th, 1903, by order of court."

Without going further into the record, it is apparent that the court properly refused the order for a *nunc pro tunc* order filing the motions for new trial. The motion for the order itself precludes a right to the order. It shows that the motions were in fact not filed until the 25th of March which was in vacation of court. It alleges that in accordance with what had frequently been done, the parties agreed and the court consented, that the record should show the filing of the motions within proper time and of their being overruled in term. Such verbal understanding can not supply a record of this nature. The case stands before us, not only with no record entry of the filing of a motion for new trial and in arrest, within the term and within four days of the verdict, but it affirmatively appears that in fact they were not filed.

The fact that the bill of exceptions recites the proper filing of the motions would not justify the trial court in making the *nunc pro tunc* order desired. Other record entries showed this not to be true. The motions for the order showed it was not true and so did the endorsement of the clerk on the back of the motions.

It has been frequently ruled by the Supreme Court

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and the two courts of appeals, as shown by authorities cited by plaintiff's counsel, that the evidence of a filing of a motion for new trial must be found by recitation in the record proper. It follows that such recitation in the bill of exceptions will not suffice.

We are therefore left without a bill of exceptions to support the appeal. And finding no error in the record proper, we affirm the judgment. All concur.

HENRY BUSHNELL, Respondent, v. FARMERS MUTUAL INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, February 6, 1905.

1. **INSURANCE: Application: Company's Act.** Where the agent of the insurer makes application without the insured's assistance and presents the same with the request that the latter sign it, the statements therein are the statements of the company itself.

2. **———: Tenant's Negligence: Instruction.** A stipulation in a policy of fire insurance made any act of gross negligence by the tenant the act of the insured. An instruction that if the jury believe the tenant burned a brushpile in "dangerous proximity" to the house and therefrom the house took fire, there could be no recovery, is properly refused, since there is no question of negligence embraced therein.

3. **———: Subsequent Encumbrances: Notice: Assessments: Estoppel.** Where the insured notifies insurer's agent of subsequent encumbrances and the company thereafter collects assessments it is estopped from claiming that notice should have been given to the directory conceding notice to them ordinarily necessary.

4. **———: ———: Transfer: Construction.** A stipulation in a policy of fire insurance made any transfer or change of title avoid the policy. *Held,* this did not mean an encumbrance or mortgage but a change in the title.

Appeal from Livingston Circuit Court.—*Hon. J. W. Alexander,* Judge.

AFFIRMED.

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Lewis A. Chapman, Loomis & Hudson for appellant.

(1) A warranty in a contract of insurance must, if affirmative, be strictly and exactly true, and if promissory must be literally fulfilled; the validity of the entire contract depends thereon, otherwise it becomes void. 3 Joyce on Insurance sec. 1970; Digby v. Ins. Co., 3 Mo. App. 603; Crook v. Ins. Co., 38 Mo. App. 582; Maddox v. Ins. Co., 56 Mo. App. 343. (2) We claim that under the evidence in this case the plaintiff was barred from a recovery for the reason that the contract was nullified by reason of the falsity of the warranty. 3 Joyce on Ins., sec. 1275; School Dist. v. Ins. Co., 61 Mo. App. 597; 3 Joyce on Ins., sec 1970; 3 Joyce on Ins., sec. 1962; Fitch v. Ins. Co., 59 N. Y. 557; Thomas v. Ins. Co., 108 Ills. 91; Campbell v. Ins. Co., 98 Mass. 381; Fowler v. Ins. Co., 16 Am. Dec. 460. (3) A false statement as to encumbrance on the amount of the same vitiates the policy where made a part thereof and a warranty or where made a material by stipulation or special inquiry. 3 Joyce on Ins., sec. 2016; Hayward v. Ins. Co., 10 Cush. 444; Ins. Co. v. Jordan, 24 Neb. 358; Smith v. Ins. Co., 118 N. Y. 518. (4) Instruction number 3 asked by the defendant and refused by the court should have been given. Why the court refused to give this instruction it would be hard to state. R. S. 1899, sec. 748. (5) The court sitting as a jury in the trial of a cause should not deny to a party declarations of law applicable to the facts of the case. Cunningham v. Snow, 82 Mo. 587; Harbison v. School District, 89 Mo. 184; Davis v. Scripps, 2 Mo. 187; Miller v. Brencks, 83 Mo. 163; Heisey v. Goodum, 90 Mo. 366; Tyler v. Larmore, 19 Mo. App. 446; Lee v. Poter, 18 Mo. App. 387; VanBuren v. Ins. Co., 28 Mich. 399. (6) The court committed error in refusing to give on behalf of the defendant instruction number 6 of the instructions asked by the defendant. One of the defenses set up in

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the answer was that in addition to the encumbrance on the land at the time the contract of insurance was made the plaintiff executed and delivered other deeds of trust conveying the premises insured. (7) A policy may prohibit any alteration in the title or ownership. Where a clause of this nature is inserted it has been held that a mortgage will constitute an alteration within the meaning of the clause. Hutchins v. Ins. Co., 11 Ohio St. 477; 3 Joyce on Insurance, sec. 2267.

J. M. Davis & Sons, B. B. Gill and *Sheetz & Sons* for plaintiff.

(1) The application was not referred to in the contract or policy of insurance and was not by the terms thereof made a part of the contract of insurance, and therefore was not a part thereof. Elliott v. Ins. Co., 76 Mo. App. 566, and cases cited; Goodson v. Ins. Co., 91 Mo. App. 348; Ins Co. v. Monninger, 18 Ind. 359; Ins. Co. v. Cotheal, 7 Wend. 72, 22 Am. Dec. 567; Ins Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 698. (2) The condition in section 6 of the by-laws requiring that "if the interest of the property to be insured be a leasehold or other interest not absolute, it must be so stated in the application," did not require the insured to disclose the existence of the mortgage on the property and did not render the policy void, because he did not disclose the existence of the mortgage or deed of trust. Boulware v. Ins. Co., 77 Mo. App. 639, and cases cited. (3) A mortgage or deed of trust on property existing at the time of issuing an insurance policy does not avoid the policy even where the policy provides that the interest of the assured must be entire, unconditional and sole ownership. In order to avoid the policy by reason of liens or encumbrances, the policy must expressly provide that it shall be void if the property is encumbered. The policy in question does not so pro-

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vide. Hubbard and Spencer v. Ins Co., 33 Iowa 333, and cases cited; Friezen v. Ins Co., 30 Fed. 357, and cases cited; Carson v. Ins. Co., 14 Vroom (N. J.), 300; 39 Am. Rep. 584; Ins. Co. v. Lancaster, 7 Tex. Civ. App. 677, 28 S. W. 126, and cases cited; Ins. Co. v. Coffman, 13 Tex. Civ. App. 439, 35 S. W. 406; Carrigan v. Ins. Co., 53 Vt. 418, 38 Am. Rep. 687; Ins. Co. v. Weill, 28 Gratt. (Va.) —, 28 Am. Rep. 364; Wolf v. Ins. Co., 115 Wis. 272, 91 N. W. 1014; Dolliver v. Ins. Co., 128 Mass. 315, 35 Am. Rep. 378. (3) A mortgage given on property covered by an insurance policy will not avoid the policy. A mortgage is not such an alienation, transfer or change of title as will avoid the policy. Jecko v. F. & M. Co., 7 Mo. App. 313; 2 Washburn on Real Property (4 Ed.), 165; Shepherd v. Ins. Co., 38 N. H. 232; Fulsom v. Ins. Co., 10 Fost. 231; Ins. Co. v. Bruner, 23 Penn. St. 50; Tittemore v. Ins. Co., 20 Vt. 545; Pollard v. Ins. Co., 42 Me. 221; Smith v. Ins Co., 50 Me. 96; Dutton v. Ins. Co., 9 Fost. 153; Rollins v. Ins. Co., 5 Fost. 200; Jackson v. Ins. Co., 40 Mass. 418; Rice v. Tower, 67 Mass. 426; Conover v. Ins. Co., 3 Denio 254; Ins Co. v. Stewart, 13 Ind. App. 627, 42 N. E. 286; Taylor v. Ins Co., 83 Ia. 402, 49 N. W. 994; Loy v. Ins Co., 24 Minn. 317; Fire Office v. Clark, 53 Ohio St. 414, 42 N. E. 248. (4) Negligence of the tenant of the assured or his children, even though it had been shown, which it was not, that it was the cause of the fire, is not a defense to this action. Gates v. Ins Co., 5 N. Y. 478, and cases cited, 55 Am. Dec. 360; Ins. Co. v. Glasgow, 8 Mo. 713; Lovelace v. Ass'n, 126 Mo. 116; Karow v. Ins. Co., 57 Wis. 56, 15 N. W. 27; Pool v. Ins. Co., 91 Wis. 530, 65 N. W. 54; Mut. Pro. Co. v. Douglas, 58 Pa. St. 419, 98 Am. Dec. 298; Hinns v. Ins. Co., 16 Barb. 119. (5) The application having been written in its entirety by Tudor, the secretary of defendant, without having asked plaintiff a single question, as plaintiff testified, and as the court found, the application became and was the act of the insurance company and can not be used

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against the plaintiff. Ins. Co. v. Wilkerson, 13 Wall. (U. S.), 232, cited and approved in Thomas v. Ins. Co., 20 Mo. App. 150; Lanyford v. Ins. Co., 97 Mo. App. 84; Donnelly v. Ins. Co., 70 Ia. 693, 28 N. W. 607, and cases cited; Stone v. Ins. Co., 68 Ia. 737, 28 N. W. 47. (6) Bushnell notified Jones, the president, and Tudor, the secretary and agent of defendant company, of the subsequent deeds of trust thereon. If defendant desired to avoid the policy it was their duty to cancel the policy instead of receiving the assessment thereon and leaving plaintiff to believe that the policy was a valid and continuing contract of insurance, and the defendant cannot now be heard to insist on a forfeiture. Mills v. Ins. Co., 95 Mo. App. 216, and cases cited; Ormsby v. Ins. Co., 98 Mo. App. 371; Laundry Co. v. Ins. Co., 151 Mo. 90.

ELLISON, J.—The defendant is a local farmers' insurance company in Livingston county which insured farm property. It insured the plaintiff's property for a term of five years and issued to him the policy in suit. Plaintiff prevailed in the trial court. The policy expressly makes the constitution and by-laws of the company a part of the policy itself, but does not include the application; though that omission is of no consequence as we view the case.

One of the principal points of defense is that at the time of the application and when the policy was issued there were one or more incumbrances on the property, and that plaintiff stated in the application that there were none. The reply plaintiff made to that was that the application was prepared by defendant's agent and secretary without the assistance of plaintiff and that he presented the application to plaintiff with the request that he sign it, which the plaintiff did. We have already ruled more than once that such fact made the application the act of the company and statements therein the statements of the company itself. [Thomas

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v. Ins. Co., 20 Mo. App. 150; and Ormsby v. Ins. Co., 105 Mo. App. 143, citing Combs v. Ins. Co., 43 Mo. 148; Shotliff v. Ins. Co., 100 Mo. App. 138, and Ins. Co. v. Wilkinson, 13 Wall. 222. The defendant is therefore now disabled from setting up such defense.

It seems that the property was occupied by a tenant and that the by-laws make any act of gross negligence by the tenant the act of the insured. It further appears that there was evidence tending to show that the house was burned by the tenant setting fire to a pile of brush near by from which the house caught. In view of this, defendant asked an instruction which declared that if the brush pile was in "dangerous proximity" to the house and that the house took fire from it there could be no recovery. No question of negligence was embraced in the instruction and from defendant's own standpoint was properly refused. Men do many things which turn out to be dangerous in the light of results and yet they may be in no degree negligent.

The sixth instruction refused for defendant submitted that if plaintiff after the policy was issued put incumbrances on the property without the knowledge and consent of the company, that rendered the policy void. Defendant claims that knowledge of the company by the provisions of the contract of insurance means the knowledge of the board of directors and that there is no pretence that the board knew of the subsequent incumbrances. It is not necessary to discuss such suggestion from the fact that there was evidence tending to show plaintiff notified defendant's agent and secretary of such incumbrances and that thereafter the company collected assessments from plaintiff. The company is therefore estopped from now claiming that notice should have been given to the directory, conceding notice to them ordinarily necessary.

But it should be stated in this connection that the agent, while admitting the collection of assessments from plaintiff after the subsequent incumbrances were

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placed on the property, denies that he had any knowledge of such subsequent incumbrances, thus contradicting what plaintiff testified to on that head. So it is a part of defendant's contention that instruction numbered 6, submitting the question as an issue of fact, should have been given. The provision of the by-law upon which the instruction was based is: "In case of any transfer or change of title whatever in the property insured by this company such insurance shall be void and cease, unless assigned with the assent of the board of directors." The question is thus presented whether a mortgage incumbrance securing the payment of money is a transfer or change of title within the meaning of the by-law. It will be noticed that there must be a *transfer* or *change* of title. Now, a mortgage is a mere security for debt. In deeds of trust the legal title so far passes as to make the trustee a proper party plaintiff to bring ejectment. But after all, there has been no substantial and real change of ownership of the land further than to establish an encumbrance or lien on it. And so the difference or distinction between what is understood to be an incumbrance and a transfer of title is recognized in the application and by-laws of this company. Reference is therein made to an incumbrance and to a change of title as distinct matters. A mere lien for money which, if paid will discharge the lien, is recognized as an encumbrance and not a transfer or change of title. In determining questions like the present, care must be taken to note the wording of the by-law or contract to be construed. The interpretation of contracts of this nature vary with the language used in expressing them. As, for instance, some contracts will be found to read, "any *alteration*" of the title; or, if the title is not "sole, absolute and unconditional;" or, "if the title be incumbered;" and the like. These expressions have been frequently judicially construed to cover a mortgage or deed of trust. [Grigsby v. Ins. Co., 40 Mo. App. 276; Barnard v. Ins. Co., 27 Mo.

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App. 26; Hubbard v. Ins. Co., 57 Mo. App. 1; Harness v. Ins. Co., 62 Mo. App. 245.] But confining ourselves to the contract before us, we hold that, in the sense of that contract, there was not a change or transfer of title by the subsequent mortgages or deeds of trust. The instruction was therefore properly refused.

The question has not been answered with uniformity by the authorities, as will be seen by an examination of the American & Eng. Encyclopedia of Law, vol. 13, pp. 24-246 (2 Ed.). But in view of the terms of the constitution, by-laws and policy in evidence, as well as the reason of the matter, we believe that we have given the proper construction.

The case has been argued and briefed at considerable length by the respective counsel, but the case is sufficiently considered and disposed in the foregoing. The judgment is affirmed. All concur.

WILLIAM WAGES, Respondent, v. QUINCY, OMAHA & KANSAS CITY RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, February 6, 1905.

1. **RAILROADS: Killing Stock: Statement: Owner of Field: Justice's Courts.** In the circuit court a petition for double damages for killing stock should properly state whether plaintiff was the owner of the field, or that the animals got into the field by reason of an unlawful fence or by permission of the owner, but such strictness is not required in justices' courts.

2. **———: ———: Form of Verdict.** A form of verdict given the jury by the court and set out in the opinion is held not subject to the criticisms raised against it.

3. **———: ———: Verdict: Motion to Double.** After the verdict is received it is sufficient that a motion to render judgment for double the amount may be made orally and need not be in writing.

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Appeal from Sullivan Circuit Court.—*Hon. John P. Butler*, Judge.

AFFIRMED.

J. G. Trimble and *Wilson & Clapp* for appellant.

(1) Sec. 1105, R. S. 1899, is a penal statute, and every fact necessary to be proven on the trial to make out a case under the statute must be alleged. Manz v. Railroad, 87 Mo. 278. (2) Where the field is inclosed the statement must allege facts showing that the animal was lawfully in the inclosure. Ferris v. Railroad, 30 Mo. App. 122; Board v. Railroad, 36 Mo. App. 151; Harrington v. Railroad, 71 Mo. 384; Rinehart v. Railroad, 80 S. W. 910. (3) The law specifically states how fields shall be inclosed and what constitutes a lawful fence—and requires all fences to be so built. R. S. 1899, secs. 3294-5. (4) The presumption is, until the contrary appears, that the fences inclosing a field are lawful fences, as it is presumed that every one will do what the law requires him to do. McCallister v. Ross, 155 Mo. 87. (5) Plaintiff's second instruction is erroneous. The form of the verdict is wrong. (6) The court erred in doubling the verdict on the verbal motion of plaintiff. R. S. 1899, sec. 640.

Wattenbarger & Bingham for respondent.

(1) Plaintiff's statement alleged every fact that was necessary to entitle him to the evidence adduced. (2) It was sufficient to prove, as respondent did prove, that the cow was on the premises of plaintiff's father by and with his consent. Brown v. Railroad, 78 S. W. 273. (3) When double damages are allowed by the statute and the jury find single damages in terms, the court will direct judgment to be entered for the increased amount. 5 Am. and Eng. Ency. of Law (1 Ed.), 62e.

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ELLISON, J.—The plaintiff brought his action before a justice of the peace to recover double damages resulting to him on account of defendant having run one of its engines against his cow, the animal having escaped onto the track by reason of a defective fence where the road ran through inclosed fields. The verdict was for plaintiff in the sum of $35, which, on plaintiff's motion, was doubled and judgment rendered for $70. It appears from the evidence that plaintiff, an unmarried man, was living with his father and that plaintiff's animal was running in his father's pasture by the latter's consent.

The defendant contends that the statement filed before the justice does not show that plaintiff was the owner of the field, or that his animal was lawfully running in said field, or facts from which it would appear that it was lawfully in the field. We do not think it necessary that such allegations should affirmatively appear in the statement. It is not so decided in the cases of Ferris v. Railroad, 30 Mo. App. 122, and Board v. Railroad, 36 Mo. App. 151, or the other cases cited by defendant. The syllabus in the Board case is somewhat misleading.

The statement in this case does not allege who was the owner of the field. It merely designates the land as "an adjoining field." In actions begun in the circuit court, it is the better pleading in cases where the plaintiff is not the owner of the adjoining field to allege, either that the animals got into such field by reason of the field not having a lawful fence, and thence strayed onto the track; or, that the animals were in the field by permission of the owner. [Farmers Bank v. Railroad, 109 Mo. App. 165, 83 S. W. Rep. 76.] But no case has held such to be necessary in an informal statement before a justice of the peace. A statement quite as informal as this was held at this term to be sufficient in an opinion by Broaddus, P. J., in Seidel v. Railroad, 109 Mo. 160, 83 S. W. Rep. 77.

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The defendant objected to an instruction as to the form of the verdict if the jury found for plaintiff, which read: "We the jury find for plaintiff in the sum of $———." Defendant contends that it should have read, "We the jury find for plaintiff *and assess his damages* at the sum of $———." It is suggested that under the form given by the court the jury were at liberty to find for plaintiff more than his damage. We think the objection not well taken.

It seems that after the verdict plaintiff orally moved that the judgment be rendered for double the amount thereof and that the judgment was so entered. It is objected that the motion should have been in writing. We think the objection not well taken.

There are some other suggestions which we do not think go to the substantial merits of the case. The judgment was manifestly for the right party (Brown v. Railroad, 78 S. W. Rep. 273) and is affirmed. All concur.

JOHN S. POINDEXTER, Defendant in Error, v. JAMES McDOWELL et al., Plaintiffs in Error.

Kansas City Court of Appeals, February 6, 1905.

1. **BILLS AND NOTES: Evidence: Varying Contract.** No contemporaneous verbal agreement adding to or varying a written contract can in any manner affect such contract except in cases of fraud, accident or mistake.

2. ———: **Contemporaneous Agreement: Reading.** The fact that one signed a note supposing the same to be paid in a certain manner is not such mistake as to excuse him, since he is presumed to have read the note.

3. ———: ———: **Fraud.** Where an assured gives his note for the premium with the agreement that the insurer would loan him five thousand dollars to lift certain mortgages and pay the note, the failure to make the loan does not constitute a fraud in procuring the note.

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4. ———: **Defense: Peremptory Instruction: Trial Practice.** Where the defendant fails in his defense against his note it is the duty of the trial court to peremptorily instruct the jury in favor of the plaintiff.

Error to Moniteau Circuit Court.—*Hon. Jas. E. Hazell*, Judge.

AFFIRMED.

L. F. Wood for plaintiff in error.

(1) The appearance of defendants before the justice was a plea of the general issue, which includes fraud, misrepresentation and failure of consideration. Harnsby v. Stevens, 65 Mo. App. 189. (2) In his petition the plaintiff says that he is an innocent purchaser for value before maturity. This is an "express aider" and plaintiff assumed the affirmative of the issue he thus makes. Henry v. Sneed, 99 Mo. 424. (3) It will not be denied by anybody that if defendant's evidence is to be believed, the notes had their inception in the grossest fraud. (4) The court erred in taking the case from the jury. Johnson v. McMurry, 72 Mo. 278; Kenny v. Railroad, 80 Mo. 578; Ehret v. Railroad, 20 Mo. App. 260; Campbell v. Hoff, 129 Mo. 324; Hamilton v. Marks, 63 Mo. 167; Whaley v. Neill, 44 Mo. App. 316; Ganz v. Winebrenner, 66 Mo. App. 110; Gannon v. Gas Co., 145 Mo. 517; Samuel v. Potter, 28 Mo. App. 369; Smith v. Mohr, 64 Mo. App. 45; De Greer v. Pryor, 53 Mo. 313; Gooch v. Holland, 30 Mo. App. 454; Jenks v. Glenn, 86 Mo. App. 329.

R. M. Embry for defendant in error.

(1) The testimony of plaintiff is that he bought the notes before maturity, paid a valuable consideration for same, and that he knew nothing about the transaction between F. A. Dickey, the payee, and the defendants who are the makers of the note. The defendant, James McDowell, testifies that if plaintiff,

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Poindexter, knew about the transaction it was unknown to him. In such cases it is proper to take the case from jury by peremptory instruction. Bank v. Hainlain, 67 Mo. App. 483; Woolner v. Levy, 48 Mo. App. 469; Powell v. Powell, 23 Mo. App. 365; Hamilton v. Marks, 63 Mo. 167; Bank v. Schoen, 56 Mo. App. 160; Mayes v. Robinson, 93 Mo. 114. (2) It is the rule that a court should not submit a case to a jury when the verdict will not be permitted to stand if rendered against the evidence and this though there may be a mere scintilla of evidence. Morgan v. Durfee, 69 Mo. 469; Powell v. Railroad, 76 Mo. 80; Ruchenbach v. Ellere, 115 Mo. 588.

ELLISON, J.—This action is based on two negotiable promissory notes given to one Dickey and by him transferred to plaintiff before maturity for value. At the close of the evidence for both parties the trial court directed a verdict for plaintiff.

The only question for consideration is the propriety of the peremptory instruction given in plaintiff's behalf. The undisputed evidence showed that the notes were given for premium on a life insurance policy which defendant McDowell took out through Dickey, the agent of the insurance company. That they were transferred to plaintiff for value before maturity. There can be no possible question but that plaintiff's case, as made by evidence in his behalf, demanded a verdict from the jury unless it was met by some legal defense in the evidence introduced by defendants.

Defendants admitted they gave the notes for a life policy, but that the agent, Dickey, verbally agreed at the time that his company would loan McDowell five thousand dollars at five per cent interest with which the latter could take up a mortgage then on his farm at a higher rate of interest; and that the notes in suit were to be paid out of the money so to be loaned to defendant by the company. It is familiar law that no

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contemporaneous verbal agreement adding to, or varying, a written contract can, in any manner, affect such contract. It has been so often pointed out that to permit such thing to be done would destroy all written agreements, that we need not recite the policy or reasons for the rule. The rule is subject to exception in instances of fraud, accident or mistake. There is no pretence of any accident in this case. The only mistake suggested is that the notes were due in one year from date and that McDowell did not notice that when he signed them, but supposed they were to be due immediately and were to be paid out of the money he said he was to borrow from the insurance company. That, of course, was no excuse for him. He is presumed to have read the notes. [Crim v. Crim, 162 Mo. 544; Railroad v. Cleary, 77 Mo. 634; O'Bryan v. Kinney, 74 Mo. 125. There was, therefore, no mistake shown of which the law can take notice.

As to fraud, there was nothing shown that in the least tended to support that idea. The most that can be said is that if Dickey made the verbal agreement that the company should loan the money, that such agreement has not been carried out. There is nothing in the case which suggests, even remotely, that there was any fraud, trick or device in obtaining the execution of the notes. [Johnston v. Ins. Co., 93 Mo. App. 588; Catterlin v. Lusk, 98 Mo. App. 182.]

We may concede fully every thing offered by defendants and permit every reasonable inference to be drawn therefrom and, yet, under the law, there was no defense. It was therefore the bounden duty of the court to take the action it did and give the peremptory instruction. [Bank v. Hainline, 67 Mo. App. 483; May v. Crawford, 150 Mo. 504, 527.]

We have gone carefully over the evidence presented and the argument of counsel and have concluded that the judgment was manifestly for the right party, and hence order its affirmance. All concur.

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THE CITY OF ST. JOSEPH ex rel. E. R. GIBSON, Defendant in Error, v. ZEILDA FORSEE, Plaintiff in Error.

Kansas City Court of Appeals, February 6, 1905.

1. **TRIAL PRACTICE: Reply: Trial.** Where no reply is filed to the new matter set up in the answer and a trial does not proceed upon the supposition that a reply is in, the allegations of the answer must be accepted as admitted facts.

2. **TAXBILL: Name of Dead Owner: Mistake: Amendment.** The requirement to insert in the taxbill the name of the owners of the respective lots to be charged should have a fair and liberal construction so as to give effect to the obvious purpose of the enactment; and where the engineer inserts the name of the record owner, who is known to be dead at the time the bill is issued, such act will be treated as a mere mistake, not as a suppression of a material fact, and an amendment will be permitted at the trial.

3. ——— ———: **Amendment: Evidence.** The fact of such amendment will enable the plaintiff to use the bill to make a prima facie case and so obviate the necessity of evidence *aliunde*.

4. ———: ———: **Interest: Penalty.** The rule that excludes the taxbill as prima facie evidence against the true owner until his name is legally inserted therein prevents the imposition of penalties upon him to the same time; so that interest which, as provided in the statute is but a misnomer for penalty, can not be allowed against the true owner's interest in the lots until his name is legally inserted in the taxbill.

5. ———: **Judgment: Interest.** The judgment on a taxbill bears interest at 6 per cent only.

Appeal from Buchanan Circuit Court.—*Hon. W. K. James,* Judge.

REVERSED AND REMANDED.

James F. Pitt for plaintiff in error.

(1) Is this statute mandatory, or merely directory? If mandatory, then a taxbill made out, as in

this case, against a dead person, whom the engineer knew to be dead, and who by no possibility could be the owner, is absolutely void, and not amendable. In such circumstances the officer makes no mistake, to be corrected or amended; he willfully fails or refuses to obey the law, and his act is a nullity. Sedalia v. Gallie, 49 Mo. App. 397; Westport v. Mastin, 62 Mo. App. 657; State ex rel. v. Gibson, 12 Mo. App. 1; Kefferstein v. Knox, 56 Mo. 186; Vance v. Corrigan, 78 Mo. 97; Jaicks v. Sullivan, 128 Mo. 177; St. Louis v. Wenneker, 145 Mo. 239. (2) The judgment is excessive. It is made to bear fifteen per cent from the day of its rendition. The statute makes no provision for continuing this penalty. St. Louis v. Allen, 53 Mo. 44.

Graham & Fulkerson for defendant in error.

(1) The taxbill was amended so as to set out the correct name of the owner of the property, Zeilda Forsee. This was proper and to all intents and purposes made the bill as though it had been written that way at the time it was originally made out. Galbreath v. Newton, 45 Mo. App. 317, and cases cited; Elliott on Roads and Streets (2 Ed.), sec. 598. (2) The officer who made the original bill is the proper person to correct any error therein whether still in office or not. Galbreath v. Newton, 45 Mo. App. 318. (3) The judgment should bear fifteen per cent interest. R. S. 1899, sec. 5686.

JOHNSON, J.—This is an action upon a special taxbill issued for building a district sewer in St. Joseph, a city of the second class. The bill was made out to "Amanda Corby estate" and recited that Amanda Corby was the owner of the property against which it was issued. It was dated October 5, 1900. Zeilda Forsee is the defendant. It is admitted that Amanda Corby died on the 10th day of January, 1899;

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that at the time of her death she was the record owner of the property described in the taxbill and that defendant was and is her sole heir. During the trial plaintiff asked and obtained leave to amend the taxbill by inserting therein the name of defendant as owner in lieu of "Amanda Corby estate" and Amanda Corby. The engineer who issued the bill, but whose term of office had expired, was present and made the amendment over the objection of defendant. Thereupon, defendant by leave of court filed an amended answer in which, among other things, she alleged that at the time the bill was issued the engineer knew Amanda Corby was dead and that defendant was her sole heir. No reply was filed to this answer nor did the trial thereafter proceed upon the supposition that a reply was in. The allegations of the answer must therefore be accepted as admitted facts, and the first subject of inquiry presented is the effect of these admissions upon the validity of the taxbill.

We cannot give our sanction to the claim made by counsel for defendant that in issuing the taxbill the fact that the engineer inserted the name of Amanda Corby as owner in the face of knowledge on his part of her death and of the fact that defendant was her sole heir is evidence, in the absence of other facts, of bad faith on the part of the engineer or of the contractor. The officer finding the record title in Amanda Corby honestly might hesitate to settle the question of the descent of her property. What he did was consistent with an honest purpose. The insertion in the bill of the name of Amanda Corby as owner will be treated as a mere mistake—not as the suppression of a material fact. It has been held repeatedly in this State that the existence of such irregularities does not affect the validity of the bill as a lien upon the property.

In the case of City of St. Louis v. De Noue, 44 Mo. 139, where this subject was under discussion, it was

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held: "The requirement of the statute making it the duty of the engineer, in respect to these special sewer taxes, to insert in the bill the name of the owner of the respective lots assessed should have a fair and liberal construction so as to give effect to the obvious purpose of the enactment. There is no good reason for supposing that it was the intention of the Legislature to make the validity of the tax and the security of the lien dependent upon the industry and legal judgment of the engineer in searching out the true owner of the assessed property. . . . Regarding the clause of the statute requiring the name of the owner to be inserted in the taxbill as directory merely," etc.

Nor has the force of the rule been curtailed, as contended by defendant's counsel, in the subsequent cases of Kefferstein v. Knox, 56 Mo. l. c. 188 and Stadler v. Roth, 59 Mo. l. c. 402. In the former case the name of the owner inserted by the engineer was erased by the contractor and the name of the real owner by him inserted—an unauthorized act; and in the latter case, the taxbill was amended by changing the name to that of the real owner but the amendment was made not by the engineer who issued the bill but by his successor in office—which was also an unauthorized act. In both cases the bills were held valid as liens but were excluded as prima facie evidence against the party named as owner. In other words, the holder was required to prove the facts contained in their recitals by evidence *aliunde*. In Stadler v. Roth, supra, it was said:

"We do not understand the case of Kefferstein v. Knox, 56 Mo. 186, as holding that an unauthorized alteration of the name of the owner in a special taxbill will utterly destroy the validity of the bill as a lien, but that in consequence of such alteration, it simply ceases to be prima facie evidence of the things enumerated in the statute. And as there can be no personal liability on the party named as owner, and such name

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is required to be inserted as a matter of convenience to the parties, it would seem to be a sufficient penalty to impose upon an alteration in this respect, not made with a fraudulent purpose, to declare that the bill should cease to be prima facie evidence even against the party originally named in it as owner."

In this court, in the case of Galbreath v. Newton, 45 Mo. App. l. c. 317, it was held: "A mistake in the name of the owner does not invalidate the taxbills. They may be amended so as to designate the true owner. . . . As argued by defendant, the taxbill is the cause of action, and as a cause of action defectively alleged may be amended, so the irregularities or informalities in a taxbill are subject to amendment."

To the same effect are the cases of Vieths v. Planet Co., 64 Mo. App. l. c. 211, decided by our sister court at St. Louis, and Vance v. Corrigan, 78 Mo. l. c. 97. There is nothing affecting adversely the conclusion reached in these cases in Jaicks v. Sullivan, 128 Mo. 177. The point decided there was that the real owner could not be made a party by amendment to a suit pending on a special taxbill after limitation had run against the bill. Recently, this court in the case of City of St. Joseph ex rel. Swenson v. Forsee, 110 Mo. App. 127, has followed the rule declared in these cases.

In our opinion the taxbill before us was at the time it was issued a valid charge against the property therein named, notwithstanding the mistake in the name of the owner. As such, it afforded a cause of action against the defendant upon which suit could be maintained. The effect of the amendment was to enable the plaintiff to use the bill as prima facie evidence against the defendant as to the validity of the charges against the property therein described and of the liability of the defendant. Had no amendment been made, proof of these facts by other evidence would have been required.

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The circuit court in the judgment rendered included interest on the amount of the taxbill at the statutory rate: that is, ten per cent per annum for the first six months, excluding the first thirty days thereof, and fifteen per cent per annum thereafter; and also allowed interest on the judgment from the date it was rendered at fifteen per cent per annum.

The validity of the taxbill as a lien upon defendant's property is sustained because it represents a proportional part of the cost of the construction of an improvement authorized by law and chargeable to defendant's property under the statute upon the theory of a reciprocal benefit to the property. The completion of the work in accordance with the provisions of the statutes and the ordinance thereunder completes the right in the contractor to have an assessment made and taxbills issued to him by the engineer. Therefore, as stated, mere irregularities in making out the bill resulting from an honest mistake of the engineer are not sufficient to defeat or suspend the lien thus created. But the recovery of interest is controlled by an entirely different principle. The use of the word "interest" in the statute is a misnomer. It is not interest but is a *penalty* to which the owner is subjected for his neglect of duty in failing to pay. [City of St. Louis v. Allen, 53 Mo. 57; Bank v. Woesten, 176 Mo. 60; Tipton v. Norman, 72 Mo. 380; Eyerman v. Blaksley, 78 Mo. 145.]

The same rule that excludes the taxbill as prima facie evidence against the real owner until his name is legally inserted therein as owner should apply to prevent the imposition of penalties upon him. The holder of such an irregular bill, who chooses to carry it, when by the exercise of small diligence he could readily have the irregularity cured, is in no position to exact a penalty against a person not named in the bill and who may not, on that very account, know of the existence of the lien against his property. It is

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our conclusion that penalties do not begin to run against an owner — or, more accurately speaking, against his interest in the property—so long as his name does not lawfully appear in the bill as owner. And as the amendment in this case was not made until the day of trial the judgment should not have included any penalty.

The circuit court also erred in allowing interest at the rate of fifteen per cent per annum on the judgment. The rate should have been six per cent. [City of St. Louis v. Allen, supra.]

For these errors the judgment is reversed and the cause remanded. All concur.

JOHN STEWART & CO., Appellants, v. JACOB A. ANDES, Respondent.

Kansas City Court of Appeals, February 6, 1905.

1. **BILLS AND NOTES: Fraud: Instruction: Burden of Proof.** When the maker of a note introduces evidence tending to prove fraud in its inception, the burden to show clean hands devolves upon the purchaser, and an instruction requiring the maker to show the existence of such fraud and plaintiff's knowledge thereof is condemned.

2. ———: ———: ———: **Covering Whole Case.** Instructions given for both parties constitute the court's charge and are to be considered as one instruction, and, if harmonious, it is immaterial that one taken by itself fails to embrace all the essential elements of the case; but where an instruction assuming to cover the whole case peremptorily directs a verdict without regard to an important issue, such as fraud in the inception of the note, it is bad, since out of harmony to the other law given.

3. ———: ———: **Evidence: Facts and Circumstances: Scienter.** The actual knowledge by the holder of a note of the payee's fraud may be shown by circumstantial evidence, and facts and circumstances that would put a prudent man on inquiry may be admitted as tending to show actual knowledge.

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Appeal from Holt Circuit Court.—*Hon. A. D. Burnes*, Judge.

AFFIRMED.

T. C. Dungan, H. M. Dungan and *H. G. Hempstead* for appellant.

(1) The jury was not mislead by the instructions. (a) We find many decisions where one word is used for another—"plaintiff" for "defendant" is the most usual. Trustees v. Hoffman, 95 Mo. App. 497; Bank v. Goddard, 8 Mo. App. 596; O'Callaghan v. Bode, 24 Pac. 271; Shortelle v. St. Joseph, 104 Mo. 121; Lin v. Railroad, 10 Mo. App. 134; Railroad v. Merritt, 47 S.E. 908; Nichols & Shepard v. Metzger, 43 Mo. App. 615. (b) Then again instructions must be construed in their entirety. McKeon v. Railroad, 43 Mo. 407; Liese v. Meyer, 143 Mo. 560; Moore v. Sanborin, 42 Mo. 493; Crawford v. Doppler, 120 Mo. 367; Cooper v. Johnson, 81 Mo. 490. (c) "To warrant a reversal, there must be positive error, such as in our opinion materially affects the merits of the action." Haniford v. Kansas City, 103 Mo. 183; R. S. 1899, sec. 865, and cases cited; Grady v. Transit Co., 102 Mo. App. 216; Woody v. Railroad, 78 S. W. 658; Kitchen v. Railroad, 59 Mo. 520; Tetherow v. Railroad, 98 Mo. 85. (2) The verdict was manifestly for the right party. Nelson v. Foster, 66 Mo. 384; Wagner v. Electric Co., 177 Mo. 60; Noble v. Blount, 77 Mo. 239, cited and approved in Sherwoods v. Railroad, 132 Mo. 346, citing R. S. 1899, sec. 865, and cases cited; also in Methudy v. Ross, 81 Mo. 482; Johnson v. Railroad, 20 N. Y. 65; Smith v. Railroad, 29 Barb. 132; Potter v. Hopkins, 25 Wend. 417; 14 N. Y. 893; Pasley v. Kemp, 22 Mo. 411; Otto v. Bent, 48 Mo. 27, cited and approved in Delaney v. Bowman, 82 Mo. App. 259; Wells v. Zallee, 59 Mo. 509; Desberger v. Harrington, 28 Mo. App. 638; Frick

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v. Railroad, 75 Mo. 595; Commiskey v. McPike, 20 Mo. App. 84; Fitzgerald v. Barker, 96 Mo. 666.

John Kennish and *J. W. Stokes* for respondent.

(1) Most of the authorities cited in appellants' brief and the arguments made, are not in point, for the reason that said authorities are cases in which a reversal was sought of the judgment of the court in overruling the motion for a new trial, on the ground of alleged error in instructions. This appeal is from a judgment sustaining the motion for error in instructions. The law is not the same in each case. Bunyan v. Railroad, 127 Mo. 22; Ittner v. Hughes, 133 Mo. 692. (2) Plaintiffs' instruction numbered 1, was misleading and erroneous. Hahn v. Bradley, 92 Mo. App. 399. (3) Error is presumptively prejudicial. Morton v. Heidorn, 135 Mo. 618; McVey v. Barker, 92 Mo. App. 507; Walton v. Railroad, 40 Mo. App. 550; Baer, Seasongood & Co. v. Lisman, 85 Mo. App. 320. (4) Plaintiffs' instructions numbered 4, 5 and 6 are erroneous, for the reason that each covers the whole case and authorizes a finding for plaintiff without reference to the issues presented by the defense. Carder v. Primm, 60 Mo. App. 423; Hohstadt v. Daggs, 50 Mo. App. 240. (5) The jury were instructed that to defeat their right to recover, plaintiffs must have had actual knowledge of the specific facts of the fraud. They were not instructed that such knowledge could be inferred from the facts and circumstances. Brown v. Hoffelmeyer, 74 Mo. App. 385; Wilson v. Riddler, 92 Mo. App. 335.

JOHNSON, J.—This action was brought by the indorsees of three negotiable promissory notes which they claimed to hold by purchase from the payee for value before maturity.

The answer under oath in effect admitted the execution of the notes but alleged that after delivery each

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of them was altered by the erasure of the words, "and attorney's fees," from the face of the instrument. Also, that all of said notes were procured by fraud practiced by the payee upon the defendant in this, that the payee, assuming to be the owner of the sole right to sell a certain wire fence machine in the counties of Buchanan and Andrew, this State, agreed in writing with defendant to appoint him its general agent with the exclusive privilege to exercise and use said right in the territory mentioned; which agreement, together with the sale of certain machines by the payee to defendant, furnished the sole consideration for the execution of the notes. It was further alleged that when these contracts were made and the notes delivered, the payee did not own the said right but had, some time before, sold it to another person, of the existence of which facts plaintiffs were charged with having actual knowledge.

The reply was a general denial.

A trial resulted in a verdict for plaintiffs upon all of the notes. The trial court, however, sustained the motion for new trial, afterwards filed by defendant, upon the ground of error in plaintiffs' instructions; and the appeal is prosecuted by plaintiffs from this order.

At the trial there was no controversy over the fact of the erasure of the words, "and attorney's fees" from the face of the notes; but it was asserted by the plaintiffs' witnesses, and denied by the defendant's, that the words were erased from the printed forms before the notes were executed and delivered. Evidence was also introduced by defendant tending to prove the charge of fraud in the inception of the notes. The agency contracts conveying to defendant the exclusive right to sell the machines in Andrew and Buchanan counties were admitted, as was also evidence to the effect that the same right was then outstanding in another person under a similar contract previously

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made by the payee; and that both transactions had been conducted by payee through the same person as its authorized agent. The evidence was sufficient to justify the submission to the jury of both issues raised by the pleadings.

The first instruction given on plaintiffs' behalf covered the whole case, presented both issues and cast the burden of proof upon the defendant, "to show the existence of such fraud and *misrepresentation and that the plaintiffs had such actual notice thereof.*" The rule is with respect to negotiable paper tainted with fraud in its inception that upon the introduction of evidence by the maker tending to prove the fraud the burden devolves upon the holder to show clean hands. He must establish the fact that he is a *bona fide* purchaser of the paper for value, before maturity, free from knowledge of the payee's dishonest conduct in its procurement. [Hahn v. Bradley, 92 Mo. App. 404; Hamilton v. Marks, 63 Mo. 167; Daniel on Negotiable Instruments, sec. 815.] To throw the burden upon the maker to show bad faith in the holder, as is done in the instruction under discussion, would greatly aid in the successful perpetration of such frauds in assisting the payees by transferring the paper to hide behind an alleged innocent holder.

Plaintiffs' instructions four, five and six are also subject to criticism. They are alike, each being based upon a separate count. They also assume to cover the whole case and without referring to other instructions unconditionally direct the jury to find for plaintiffs, if they believe the notes were in their present form at the time defendant signed them and were indorsed to plaintiffs for a valuable consideration before maturity; ignoring entirely the questions of the payees' alleged fraud and the plaintiffs' knowledge of the same.

The instructions given for both parties constitute the charge of the court to the jury, and for this reason are all to be considered together practically as one in-

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struction. If they harmonize it is not error that a given instruction taken by itself fails to embrace all the essential elements of the case. It may, in fact, be of such construction that standing alone the giving of it would be reversible error; while, considered in conjunction with other instructions, the whole charge of which it is a part, would clearly and accurately define the law of the case; but an instruction, such as these, which assuming to cover the whole case peremptorily directs a verdict without regard to important issues, and without reference to other instructions, is out of harmony with—is, in fact, contradictory to—the other law given. In effect, the court is saying in one breath, "find for plaintiffs if you believe the notes when signed were in their present form and the payee was free from the fraud charged;" and in the next breath, "find for plaintiffs if you believe the notes were not altered after delivery without regard to the manner in which they were procured."

We deem it unnecessary to refer to the verbal mistakes which were made in plaintiff's instructions one and two. It is admitted they were both inadvertently made and therefore probably will not recur. With reversible error in the instructions, the discussion of the effect of such mistakes made in the hurry of a trial would serve no useful purpose.

In view of the probability of a retrial of the case, we suggest to the trial court that actual knowledge by the holder of the payee's fraud may be shown by facts and circumstances as well as by direct evidence. Indeed, we held in Brown v. Hoffelmeyer, 74 Mo. App. 385, that evidence of facts and circumstances that would put a prudent man upon inquiry should be admitted as tending to show the existence of actual knowledge.

We conclude no error was committed in sustaining the motion for a new trial and this order of the trial court is affirmed. All concur.

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J. B. JACKSON, Respondent, v. SAMUEL H. POWELL, Appellant.

Kansas City Court of Appeals, February 6, 1905.

1. **PLEADING: Petition: Reply.** A plaintiff must recover on the allegations of his petition and not on the cause of action pleaded for the first time in his reply.
2. **PARTNERSHIP: Pleading: Settlement: Aider by Answer.** A petition seeking to recover at law certain items growing out of a partnership account should aver there had been a partnership settlement, but where the answer pleads such settlement and alleges the items sued on were included therein, it cures the defect of the petition.
3. ———: ———: ———: **Equity.** Where partners have settled and items have been omitted the remedy therefor is at law and there is nothing to give equity jurisdiction.
4. **WITNESSES: Falsus in Uno: Instruction: Willful.** It is the willful or intentional false statement of a material fact that impeaches the credibility of a witness; and an instruction to the jury on that subject should so state.

Appeal from Callaway Circuit Court.—*Hon. John A. Hockaday,* Judge.

REVERSED AND REMANDED.

D. P. Bailey and *I. W. Boulware* for appellant.

(1) The instruction is not only grossly erroneous, but is a false statement of the law. Smith v. Railroad, 19 Mo. App. 126. (2) The vice of the instruction consists in not employing the word "willfully" or "knowingly" so that the jury would have been required to find that the witness had willfully sworn falsely. Smith v. Railroad, 19 Mo. App. 126; Blitt v. Heinrich, 33 Mo. App. 243; Evans v. Railroad, 16 Mo. App. 522, and authorities cited; Falk v. Hake, 16 Mo. App. 537; Bank v. Murdock, 62 Mo. 74; Wharton on Evidence (2 Ed.),

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sec. 412; 24 Iowa 441; 80 Ill 53; 76 Ala. 93; 59 Ga. 65; State v. Elkins, 63 Mo. 166; White v. Moxey, 64 Mo. 599. (3) "The rule is that until the accounts of a partnership are settled and a balance struck one partner cannot maintain an action at law against his copartner upon a claim growing out of the partnership." Johnson v. Ewald, 82 Mo. App. 284; Scott, Admr., v. Caruth, 50 Mo. 120; Stothest v. Knox, 5 Mo. 112; Springer v. Cahill, 10 Mo. 640; McKnight v. McCutchan, 27 Mo. 436; Pope v. Salsmon, 35 Mo. 362; Buckner v. Ries, 34 Mo. 357.

N. D. Thurmond for respondent.

(1) Under the pleadings in this case all the partnership matters between the parties had been settled except the two items, the wagon and the hearse, and appellant alleges in his answer that these items had been settled in the arbitration. Defendant did not raise the question of jurisdiction in his answer and the court properly overruled defendant's objection to the introduction of any evidence on the part of the plaintiff. (2) Between partners an action at law will lie upon matters outside the partnership, or when the dispute is so disconnected with the general partnership accounts as not to involve their investigation and settlement. One partner may sue another at law where the transaction relates to one unadjusted matter growing out of partnership transactions. Whitehill v. Shickle, 43 Mo. 537; Seaman v. Johnson, 46 Mo. 111; Russell v. Grimes, 46 Mo. 410; Buckner v. Ries, 34 Mo. 357; Feurt v. Brown, 23 Mo. App. 332; Bembrick v. Simms, 132 Mo. 48; Byrd v. Fox, 8 Mo. 574; Whitstone v. Shaw, 70 Mo. 575. (3) The finding of the arbitrators was conclusive only as to the matters submitted to them. Nelson v. Barnett, 123 Mo. 564; State ex rel. v. Branch, 134 Mo. 592; Richardson v. Adams, 4 Mo. 311. (4) Although the words "willfully' and "know-

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ingly" were omitted the instruction was harmless as there could be no doubt in the minds of the jury that such false swearing was willfully and knowingly done.

JOHNSON, J.—In this action plaintiff sought to recover at law on account of a number of items growing out of a partnership which previously existed between him and defendant. A livery stable had been the busness venture of the firm. The petition alleged the sale by plaintiff to defendant of his interest in the partnership property, but stated that the sale "only included the property, horses, buggies, wagons and other things used in the livery business, but did not include the accounts defendant was owing to the firm." A number of items of such indebtedness was charged, including one relating to a hearse and one to a spring wagon; upon the former of which a partial payment, and upon the latter full payment had been made out of partnership funds. Defendant was alleged to be indebted to plaintiff upon these and the other items mentioned. No allegation of any kind of a partnership settlement was made. Defendant's answer, however, pleaded a dissolution of the partnership; the submission by the partners to arbitration of all matters in dispute between them, including all of the items sued upon; and the award of the arbitrators, after a hearing, that no indebtedness existed between the parties. In other words, that all of the partnership affairs had been settled by voluntary arbitration.

The reply admitted the settlement by arbitration and that all of the items of indebtedness mentioned in the petition were included therein except the two relating to the hearse and spring wagon which, it was alleged, were not submitted to the arbitrators and consequently not considered by them in making their award. Judgment was prayed for in the reply upon these two items.

At the trial defendant unsuccessfully objected to

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the introduction of any evidence on the ground that the court was without jurisdiction of the subject-matter. The fact of an arbitration was admitted but no written evidence of the matters submitted was introduced. They were the subject of parol testimony and the contest revolved around the fact of the submission of the hearse and spring wagon items. The evidence on this point was as conflicting as the claims of the respective parties.

Verdict and judgment were for the plaintiff on both items.

The trial court properly overruled the objection to the introduction of any evidence. The petition did not state a cause of action because of the omission to allege a partnership settlement. We agree with appellant that a plaintiff must recover upon the allegations of his petition, not upon a cause of action pleaded for the first time in his reply. But the appellant was in no position to raise this point by objection at the trial. He chose in his answer to supply the defects of the petition—to put in issue himself the fact of a settlement. The allegations of his answer were an "express aider" to those of the petition. The rule applying is well stated in the case of Slack v. Lyon, 9 Pick. 62, as follows:

"If the parties go to trial upon a full knowledge of the charge and the record contains enough to show the court that all of the material facts were in issue the defendant shall not tread back and trip up the heels of the plaintiff on a defect which he would seem thus purposely to have omitted to notice in the outset of the controversy." [Garth v. Caldwell, 72 Mo. 630; Henry v. Sneed, 99 Mo. 424; Allen v. Chouteau, 102 Mo. 318; Mendenhall v. Leivy, 45 Mo. App. 26; Bliss on Code Pleading (3 Ed.), sec. 437.

When the pleadings were in, all of the material facts necessary to maintain an action at law were admitted by both parties. The position taken by appellant

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is untenable. Actions at law in cases of this character will not lie when the affairs between the partners are unadjusted; but when these have been settled and a balance struck, and either intentionally or by mistake one or two items of indebtedness have been omitted, a suit at law is the only remedy—there is nothing to adjust, nothing to give jurisdiction to equity. Such jurisdiction obtains when the adjustment of the matter in controversy involves the investigation and settlement of the partnership accounts. [Russell v. Grimes, 46 Mo. 412; Buckner v. Ries, 34 Mo. 357; Scott v. Caruth, 50 Mo. 120; Murphy v. De France, 23 Mo. App. 337; Bambrick v. Simms, 132 Mo. 51.]

Plaintiff's second instruction was erroneous. It told the jury, "you are the sole judges of the evidence and the weight of the evidence and the credibility of the witnesses and if you believe any witness has sworn falsely as to any material fact in the case you may disregard the whole of such witness's testimony."

It is the *willful* or *intentional* false statement of a material fact that impeaches the credibility of the witness. In view of the sharp conflict in the testimony, we do not in this case condemn the giving of an instruction based upon the maxim, *falsus in uno, falsus in omnibus;* but under such instruction the jury should not be told in effect to brand as a false witness one who, mistaken about a single material fact, may have been innocent of an intentional untruth. [Smith v. Railroad, 19 Mo. App. 125; Blitt v. Heinrich, 33 Mo. App. 245; State v. Elkins, 63 Mo. 166.]

We find no other error. The judgment is reversed and the cause remanded. All concur.

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ETHEL ARNOLD, by Next Friend, etc., Respondent, v. THE CITY OF MARYVILLE, Appellant.

Kansas City Court of Appeals, February 6, 1905.

1. **EVIDENCE: Personal Injury: Pleading: General Averment: Particular Acts.** A petition for personal injury alleged that the bones of the foot were broken and the ligaments torn confining the plaintiff to her room with great pain and permanent disability of the foot, attended with expense, etc. *Held*, that evidence of a malignant growth on the foot and the subsequent amputation thereof could not be shown in evidence as elements of damage.

2. ———: ———: ———: ———: ———: **Subsequent Amputation.** Under the averments of the petition it could be shown that the injuries specifically charged continued down to the time of the trial and were permanent, but evidence of amputation subsequent to the institution of the action is inadmissible.

3. ———: ———: ———: ———: ———: ———. Under a general averment of injury and damage any result thereof may properly be shown in evidence, but when particulars of an injury are set out the plaintiff is confined to those specified.

4. ———: ———: ———: ———: ———: **Disease.** One who has received a personal injury may show that disease resulted therefrom, such as consumption or cancer or pneumonia, etc., but there must be sufficient averment in the declaration.

5. **PLEADING: Trial Practice: Petition: Demurrer.** Where a petition alleges a particular cause of action for specifically named injuries, it is not subject to demurrer or motion, since it is not defective in form or substance, but evidence of matters outside the petition should not be admitted.

6. **TRIAL PRACTICE: Objection to Evidence: Instruction: Estoppel.** Where evidence is admitted over defendant's objection the fact that he submits such evidence to the jury by his instruction does not preclude his continuing to object to the evidence in the appellate court, as he has a right to try the issues forced upon him.

7. **EVIDENCE: Competency of Physician: Instruction.** Though a plaintiff fail to call his physician and the defendant calls him and plaintiff claims the privilege granted by the statute, the defendant is not entitled to an instruction calling the jury's attention to those matters and suggesting an unfavorable inference as to the character of the physician's testimony.

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8. ——: ——: **Examination to Testify: Statutory Construction.** The privilege granted by the statute is humane in its object encouraging the patient to offer every aid to impart information for relief; but when a physician is called not with the view of prescribing, but to qualify as a witness, the result of his examination is not privileged.

Appeal from Nodaway Circuit Court.—*Hon. A. D. Burnes,* Judge.

REVERSED AND REMANDED.

A. F. Harvey, L. C. Cook and *J. S. Shinabargar* for appellant.

(1) The allegations in respondent's petition are not sufficient to warrant the introduction of testimony of cancer causing the amputation of respondent's foot some four or five years after the alleged injury, such testimony being too remote, unless specially pleaded. Sedgwick on Damages (12 Ed.), sec. 1270; 5 Ency. Plead. and Prac., p. 750; O'Leary v. Rowan, 31 Mo. 119; Brown v. Railroad, 99 Mo. 318; Muth, Ex., v. Railroad, 87 Mo. App. 442. (2) Where it is attempted in the petition to specify particularly the injuries resulting from the principal one, all that are designed to be proved should be stated. Finney v. Berry, 61 Mo. 366; Coontz v. Railroad, 115 Mo. 674; Muth, Ex., v. Railroad, 87 Mo. App. 442; Grady v. Transit Co., 102 Mo. App. 212. (3) The primary cause of a cancer developing on respondent's foot some four to five years after the alleged injury was a point in issue particularly within the knowledge of respondent's physicians. They were present in court, but were not called by respondent, and when called by appellant their testimony is excluded by the court on respondent's objection. Then the jury may infer that the testimony of such physicians would be adverse to respondent, and should have been so instructed by the court. 22 Am. and Eng. Ency. Law, 1261; Cooley v. Faltz, 85 Mich.

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47, 48 N. W. 176; Vergin v. Saginaw, 125 Mich. 449, 84 N. W. 1075; Katisfiasz v. Electric Co., 24 Ohio 127; Wenerstrom v. Kelley, 27 N. Y. 326, 7 Misc. 173; Evans v. Trenton, 112 Mo. 390; Graves v. U. S., 14 U. S. 40; People v. Hovey, 92 N. Y. 559.

W. W. Ramsay, B. R. Martin, W. E. Wiles and *Blagg & Cummins* for respondents.

(1) If plaintiff has sustained a personal injury by the negligence of the defendant city, which results in a cancer, damages may be awarded for that result. Railroad v. Kemp, 61 Md. 74; Jewell v. Railroad, 55 N. H. 54, cases where a personal injury superinduced cancer. Stewart v. Ripon, 38 Wis. 584, a case where a personal injury resulted in scrofula. Dickson v. Hollister, 123 Pa. St. 421, a case where a personal injury developed erysipelas. Beauchamp v. Mining Co., 50 Mich. 162, a case where pneumonia resulted from a personal injury. Railroad v. Buck, 96 Ind. 346, a case where typho-malaria fever and hemorrhage of the bowels resulted from a personal injury. Hanlon v. Railroad, 104 Mo. 381, a case where pneumonia was superinduced by a personal injury. Seckinger v. Mfg. Co., 129 Mo. 590, a case where pulmonary consumption was produced by a personal injury. We contend that plaintiff's petition states a sufficient cause of action, and is sufficiently broad to warrant the introduction of evidence of cancer. (2) The general rule is that the party who commits a trespass or other wrongful act is liable for all the direct injuries resulting from such act, although such resulting injuries could not have been contemplated as a probable result of the act done. 1 Sedg., Meas. Dam., 130, note; Eten v. Luyster, 60 N. Y. 252; Hill v. Winsor, 118 Mass. 251; Keenan v. Kavanaugh, 44 Vt. 268; Little v. Railroad, 66 Me. 239; Hart v. Railroad, 13 Met. 104; Kellogg v. Railroad, 26 Wis. 223. (3) The defects, if any, of

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plaintiff's petition, were cured by answer supplementing it. Note the last clause of appellant's answer. Price v. Protection Co., 77 Mo. App. 236; Summers v. Assn., 84 Mo. App. 605; Grace v. Nesbitt, 109 Mo. 9; Ricketts v. Hart, 150 Mo. 64; Powell v. Sherwood, 162 Mo. 605. (4) The defects, if any, of plaintiff's petition should have been taken advantage of by demurrer or by motion in the regular way. Marshall v. Ferguson, 78 Mo. App. 645; Hunt v. Ash Grove, 96 Mo. 168. (5) If the defendant pleads to the merits, he thereby waives the objection to mere formal defects, and will not be heard on the trial to object that the petition does not state a cause of action. Strauss v. Transit Co., 102 Mo. App. 644; Murphy v. Ins. Co., 70 Mo. App. 78; Buck v. Railroad, 46 Mo. App. 555; Seckinger v. Mfg. Co., 129 Mo. 590; Grove v. Kansas City, 75 Mo. 672. (6) The defects, if any, of plaintiff's petition were cured by verdict. Jones v. Underwriters, etc., 78 Mo. App. 296; Malone v. Casualty Co., 71 Mo. App. 1; Sawyer v. Railroad, 156 Mo. 468; Cobb v. Railroad, 149 Mo. 135. (7) The appellant at trial without objection, contested the issues of its liability for damages caused by the cancer. It marshalled its testimony upon that point, and by instruction numbered 4, given at their instance, solicited the trial court to submit that issue. A party will not be permitted to try a case on one theory below and invoke another on appeal. Nance v. Metcalf, 19 Mo. App. 183; Corn v. Cameron, 19 Mo. App. 573; Randolph v. Frick, 57 Mo. App. 401; Elevator Co. v. Cleary & Hamilton, 77 Mo. App. 301; Brokerage Co. v. Bagnell, 76 Mo. 554. (8) "A party may take advantage of the communication as privileged, and object to testimony in regard thereto, without any unfavorable presumption or inference arising against him." Lane v. Railroad, 21 Wash. 119; Bank v. Lawrence, 77 Minn. 282; Wentworth v. Lloyd, 10 H. L. Cas. 589; 22 Am. and Eng. Ency. Law, footnotes, 1261;

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Rice on Evidence, 647, note 2; Wentworth v. Lloyd, 10 H. L. Cas. 589; 10 Jur. N. S. 961; 33 L. J. Ch. 688; 10 L. T., N. S. 767; Rice on Evidence, 645, note 2, says: "A party cannot be asked as a witness whether he is willing to waive the privilege as to confidential communication with his physician," and cites, McConnell v. Osage, 8 L. R. A. 778; 80 Iowa 293.

ELLISON, J.—This action was brought by plaintiff through her "next friend," she being a minor. The ground of the action is personal injury received by plaintiff on one of defendant's sidewalks alleged to have been negligently permitted to become and remain out of repair. She was nine years old when injured. The result in the trial court was in plaintiff's favor.

The petition was in the usual form in such cases and after charging the negligent condition of the sidewalk, proceeded: "Plaintiff further states that, on the date aforesaid (August 25, 1898) at the said intersection of Main street and Ninth street, and while said sidewalk was then and there in the condition aforesaid, she was passing over and along the same, and by reason of the rotten and defective condition of said sidewalk and the large holes therein and being out of repair as aforesaid, she, while exercising all due caution and care, slipped and fell and her right foot passed into said hole and was violently wrenched, the bones thereof broken and the ligaments thereof torn and ruptured, in consequence of which plaintiff was confined to her room for the space of more than one whole year, suffered great pain of body and mind and became permanently disabled in said foot and is permanently deprived of the use thereof, and was compelled to and did expend a large sum of money, to-wit, $———, for medicine and medical and surgical attendance and treatment for her said injury."

There are but two points of objection to the judgment. The evidence for plaintiff showed that in

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August, 1898, she fell by reason of stepping in a hole in a sidewalk on one of defendant's streets and that her foot was wrenched and painfully hurt, some bones being broken. There was evidence further tending to show that she complained of some pain continuously after her fall and that a growth or enlargement appeared on her foot, though she walked about and attended school with other children until about three years afterwards. Finally, the growth became sufficiently serious and sore as to cause her parents to call a physician. He advised and performed an operation. A second operation was performed about one year after the first. In about a year after the second operation, being near five years after the injury, her foot was amputated on account of cancer. She instituted the present action a few weeks prior to the amputation. The evidence does not make clear just what length of time she was confined to her bed by reason of the operations including the amputation, but it was probably near one year.

Defendant objected to any evidence of the "bunch" or growth upon the foot, which was said to be the inception of the cancer, and also objected to evidence that she could not wear a shoe on that foot, for the reason that, "the time was too remote," and that, "it was not pleaded in the petition." After these objections were overruled defendant also objected to evidence showing the amputation of the foot on account of the cancer, for the reason that it occurred after filing the petition. That objection was likewise overruled.

Each of those objections should have been sustained. It will be noted that the petition alleges the specific consequences which followed, or were caused by, or resulted from, the fall, viz.: that her foot was violently wrenched, that the bones of her foot were broken and that the ligaments of her foot were torn and ruptured, "in consequence of which" she suffered "great pain of body and mind and became permanently dis-

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abled in said foot'' and was put to the expense stated. It seems to be clearly improper to admit evidence of a totally independent injury manifestly not falling within those specifically set up as the result occasioned by defendant's negligence.

The amputation of the foot on account of cancer thus omitted to be charged as one of the results of her injury did not occur until after this action was begun. Doubtless it may properly be shown that injuries specifically charged continued on down to the time of the trial and that they were permanent. But that is an altogether different proposition from that of suddenly confronting a defendant with a cause of injury not one of those specifically alleged and with the aggravated results of such injury after the beginning of the suit.

In an action for nuisance it will be sufficient to make a general charge of injury without specifying its details, but if the particular injuries resulting from the principal one are specified in the petition, "all that are designed to be proved should be stated." [Pinney v. Berry, 61 Mo. 366.] That case has direct application here. And the following, wherein it is held that while a general charge of negligence will be sufficient, yet if the petition sets out the particular acts, no other can be proved, state propositions closely analogous to the question before us. [Muth v. Railroad, 87 Mo. App. 422; Waldhier v. Railroad, 71 Mo. 514; Schneider v. Railroad, 75 Mo. 295; Buffington v. Railroad, 64 Mo. 246; Edens v. Railroad, 72 Mo. 212; Garvin v. Railroad, 100 Mo. App. 617.]

We do not say that if plaintiff had alleged generally that in consequence of her fall she injured her foot, that she might not have shown that a cancer was a result of that injury, or a part of that injury. But we do say that having alleged what her injuries were, and the particulars of such injuries, and that in consequence of such injuries she suffered the damage

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claimed, she can not go outside those specified. To allow such liberty would mislead a defendant and entrap him without warning.

Now, it is true that disease resulting from personal injuries may be shown as damages. Thus, in Seckinger v. Mfg. Co., 129 Mo. 590, consumption resulting from personal injury was held legitimate proof of damage. And in Baltimore Ry. Co. v. Kemp, 61 Md. 74, a cancer was shown to have followed the injury. And so of pneumonia. [Hanlon v. Railroad, 104 Mo. 381; Beauchamp v. Mining Co., 50 Mich. 162.] And so of erysipelas. [Dickson v. Hollister, 123 Pa. St. 421.] And of typhoid-malaria. [Railroad v. Buck, 96 Ind. 346.] The foregoing cases were cited and relied upon in Seckinger v. Mfg. Co., ante, but in none of them, save in the latter, was any question of pleading made or decided; indeed, the report of the cases does not show what was stated in the petition, save in the Seckinger case. In that case the petition is set out and it shows only a general allegation that the plaintiff therein was "struck on the chest by a piece of lumber" thrown from a machine which "inflicted upon him painful internal injuries," and in consequence of which he "suffered great pain of body and mind." So the question here did not in any way appear in that case.

Plaintiff has urged upon us that if there were defects in the petition they should have been taken advantage of by demurrer or by motion. But the petition was not defective in form, nor in substance; for it properly and formally alleged a cause of action. It alleged a particular cause of action for specifically named injuries. There could not have been an objection to the petition on its face. The trouble arose in giving evidence, over defendant's protest, of matters outside the petition.

Neither is defendant estopped from complaint of the admission of such evidence by the fact that the court gave an instruction, at the instance of defendant,

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submitting the question as to the cancer and amputation. Defendant was not bound to stand by and risk an adverse verdict. A party has a right to try the issues which have been forced upon him. The rule of self-invited error does not apply to such case.

The remaining objection taken to the judgment is embraced in the following statement in defendant's brief: "The primary cause of a cancer developing on respondent's foot some four to five years after the alleged injury was particularly within the knowledge of respondent's physicians. They were present in court, but were not called by respondent, and when called by appellant their testimony was excluded by the court on respondent's objection. Then the jury may infer that the testimony of such physicians would be adverse to respondent, and should have been so instructed by the court." It is but repeating the statute itself (section 4659, Revised Statutes 1899), to say that, all information obtained by a physician whether by communication from the patient or observation of the physician "which information is necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon," is privileged and cannot be used against the patient without his consent. [Smart v. Kansas City, 91 Mo. App. 597.] Therefore, though a physician called to attend upon a plaintiff professionally may learn all about the nature of his injuries or the disease said to have followed therefrom, and no one else may know so well as he, yet the plaintiff need not call him as a witness and if he does not do so, no unfavorable inference should be drawn therefrom. [Lane v. Railroad, 21 Wash. 119; Nat'l Bank v. Lawrence, 77 Minn. 282.] It is not even permissible to ask of the party whether he will waive the privilege and permit the physician to testify, since his refusal would tend to discredit him and thereby in a manner force him to consent. [McConnell v. City of Osage, 80 Iowa 293.] In Wentworth v. Lloyd, 10 H. L. Cas. 589, it was held

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no ground for presumption against one who refused to waive the privilege as to communications made to his solicitor in a professional capacity. It must be clear that if an unfavorable presumption against one should be allowed when he refused to waive his privilege; or failed to call the physician as a witness, the privilege itself would be destroyed and the policy of the statute thwarted. The question here presented was not under consideration and was not decided by the remark of the court in Evans v. Town of Trenton, 112 Mo. 403, 404.

But there is a further consideration embraced in the point made by defendant which is not so easily disposed of. It is claimed by defendant that three physicians were called by plaintiff to examine her for the sole purpose of qualifying them as witnesses in her behalf as to the nature and extent of her injuries. The first object of the statute may be said to be a humane object: that is to say, to render as much aid as possible to the restoration of the patient's health or relief from his suffering and injury. It therefore adopted the policy of rendering every assistance to the physician by holding inviolate any communication made to him in his professional capacity and any information he might receive from an examination of his patient which were *necessary to enable him to prescribe;* thus encouraging and inducing the patient to offer every aid in his power towards imparting the information. The words of the statute are, "which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." It is apparent that the information gathered by the physician or surgeon must be in his capacity of waiting upon the patient with a view to his cure or relief, if possible: that is to say (in the words of the statute), to enable him to prescribe for the patient as a physician, or do any act for him as a surgeon. So therefore if a physician or surgeon examines a sick or injured

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person, not with a view of prescribing for him or doing any act for him in the line of surgery, he is not disqualified as a witness. It was no part of the object of the statute to facilitate the efforts of a litigant in obtaining evidence with which to advance his cause. We therefore rule that if it appears that physicians or surgeons were called to examine plaintiff only with a view of qualifying them to testify in the cause, the result of their examination was not privileged.

The judgment will be reversed and the cause remanded. The other judges concur.

MATTIE H. BROWN, Respondent, v. A. A. WINTSCH et vir, Appellants.

Kansas City Court of Appeals, December 19, 1904.

1. **EVIDENCE: Slander: Plaintiff's Appearance.** In an action for slander evidence that plaintiff appeared very much distressed and grieved when she learned of the fact of the slander is admissible.

2. ———: ———: **Pleading.** In a petition for slander where the language is unambiguous an innuendo is unnecessary; and where the meaning of the words charged is obvious the statement of a witness in regard to what defendant meant is of no importance since it can have no effect on the jury.

3. **SLANDER: Pleading: Instructions.** In an action for slander different sets of words spoken on different occasions may be set forth in one count and included in the same cause of action and then there can be but one general finding. And instructions set out in the opinion are approved as directing but one finding.

4. ———: **Adultery: Fornication: Common Law: Statute.** At common law a charge of unchastity (when the action was not made a crime) was not actionable *per se*; but under section 2863, Revised Statutes 1899, it is actionable to publish that a person has been guilty of fornication or adultery, and this is

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so whether the accused party can be legally guilty of the technical offense charged or not, since the words are used to indicate a charge of a disgraceful and immoral act.

5. ——: ——: ——: ——: ——. Christal v. Craig, 80 Mo. 367 is held inapplicable, Broaddus, J., dissenting in a separate opinion.

Appeal from Jackson Circuit Court.—*Hon. Shannon C. Douglass*, Judge.

AFFIRMED.

B. Wells and *L. H. Watters* for appellants.

(1) Plaintiff over defendant's objections was permitted to prove by Mrs. Duke how plaintiff appeared when she told her that Mrs. Wintsch had been talking about her and trying to run her character down. (2) Mrs. Griffin, over defendant's objections, was allowed to testify that she understood Mrs. Wintsch to mean that they were living together in adultery and fornication. There was nothing ambiguous or uncertain about the words spoken and such testimony should have been excluded. Callahan v. Ingram, 122 Mo. 355; Lewis v. Humphreys, 64 Mo. App. 471; Caruth v. Richardson, 96 Mo. 186; State v. Bonner, 85 Mo. App. 462. (3) The court erred in giving plaintiff's instructions numbered 1, 2, 3, 4, 5, 6 and 7. (a) Three separate and distinct causes of action were stated in the same count and instructions numbered 1, 2 and 3 authorized a recovery on each. While several defamatory statements may be stated in a single count, there can be a recovery as to but one. Birch v. Benton, 26 Mo. 153; Pennington v. Meeks, 46 Mo. 217; Burcher v. Scully, 107 Ind. 246. (b) The petition alleges that plaintiff, by reason of all of said false charges and slanderous words, was greatly injured, etc., and has been damaged in the sum of $5,000. These instructions allowed a recovery for each and all the slanderous words charged. (4) The first

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instruction did not submit to the jury the question whether plaintiff was an unmarried woman or whether the innuendo was sustained. Callahan v. Ingram, 122 Mo. 367; Starkie on S. & L. sec. 466; Newell on Def. S. & L., sec. 388; Townsend on Slander and Libel, sec. 338. (5) The second instruction failed to submit the question whether plaintiff was an unmarried woman. The proof showed that she was and could not have been guilty of adultery. Christal v. Craig, 80 Mo. 373; Hood v. State, 56 Ind. 263; 1 Bouvier, Dic., title "Adultery;" Abbott's Law Dic., title "Adultery;" Am. and Eng. Ency. Law, "Adultery." (6) The third instruction is subject to the same criticism as the first. (7) These instructions erroneously authorized the jury to assume that the defamatory statements were false. Callahan v. Ingram, 122 Mo. 366.

Ward & Hadley, Hunt C. Moore and *E. A. Neel* for respondent.

(1) The witness, Mrs. Duke, was properly permitted to testify as to plaintiff's appearance when she was told that defendant, Mrs. Wintsch, had been talking about her and trying to run her character down. Madden v. Railroad, 50 Mo. App. 673; Muff v. Railroad, 22 Mo. App. 584; State v. Buchler, 103 Mo. 206; Crookshanks v. Adams, 61 Mo. App. 585; Eyerman v. Sheehan, 52 Mo. 223; Boot & Shoe Co. v. Bain, 46 Mo. App. 589; Cooke v. Railroad, 57 Mo. App. 479; Greenwell v. Crowe, 73 Mo. 640. (2) There was no error committed in omitting from the first and third instructions the question whether the innuendos pleaded from the Rose and Griffin conversations were sustained, nor was there error committed in permitting the witness Griffin to testify as to what she understood the words to mean. Where words are unambiguous and libelous *per se* the innuendo and testimony thereunder will be regarded as surplusage and be rejected. Callahan v. Ingram, 122 Mo. 368;

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Newell on Defamation, Slander and Libel, p. 628, sec. 38; Odgers on Libel and Slander, 101; Townsend on Slander and Libel, p. 579, sec. 344; Lewis v. Humphries, 64 Mo. App. 472; Michael v. Matheis, 77 Mo. App. 562. (3) The instructions authorized and warranted but a single recovery. Pennington v. Meeks, 46 Mo. 219; Lewis v. McDaniel, 82 Mo. 586. (4) If there was error in admitting from the instructions the issues of Mrs. Brown being an unmarried woman, it was harmless and is not such as to warrant a reversal. R. S. 1899, sec. 659; Fitzgerald v. Barker, 96 Mo. 665; Homuth v. Railroad, 129 Mo. 629; Fox v. Windes, 127 Mo. 502; Macfarland v. Heim, 127 Mo. 327; Comfort v. Ballingal, 134 Mo. 281; Com. Co. v. Block, 130 Mo. 668; Light Co. v. Lamar, 140 Mo. 145. (5) There was no necessity for an innuendo after the words, "that Mrs. Brown was not a decent woman, as she had lived with her husband, Mr. Brown, in adultery, before they were married." R. S. 1899, sec. 2863; Hudson v. Garner, 22 Mo. 423; Stieber v. Wensel, 19 Mo. 513; Callahan v. Ingram, 122 Mo. 368. (6) The presumption or assumption of falsity of the defamatory statements was correct under the pleadings. Hall v. Jennings, 87 Mo. App. 627; Waddington v. Waddington, 21 Mo. App. 609; State v. Forrester, 63 Mo. App. 530; Hallowell v. Gentle, 82 Ind. 554a; Stowell v. Beagle, 79 Ill. 525; Broughton v. McGrew, 39 Fed. 672; Hagan v. Hendry, 18 Md. 177; Conroy v. Pittsburg Times, 139 Pa. St. 334; Thomas v. Bowen, 29 Ore. 263; McIntyre v. Bransford (Ky.), 17 S. W. 359; Byrket v. Monahan, 41 Am. Dec. 213.

BROADDUS, J.—This was an action for slander. In the petition, consisting of a single count, it is alleged (1), that plaintiff is an unmarried woman, and that on June 1, 1899, Mrs. Wintsch spoke of and concerning plaintiff to Martha Rose "that Mrs Brown had lived with her husband as man and wife before they were

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married, and that she was not a decent woman to associate with," with innuendo that she had been guilty of fornication. (2) That on August 1, 1899, Mrs. Wintsch spoke of and concerning the plaintiff to Mary Duke "that Mrs. Brown was not a decent woman, as she had lived with her husband, Mr. Brown, in adultery before they were married." (3) That on April 15, 1899, Mrs. Wintsch said of and concerning plaintiff to Mrs. Griffin "that Mrs. Brown was not decent and for me not to associate with her and that she had lived with Mr. Brown as man and wife before she married him," with innuendo that she had been guilty of fornication.

The answer was a general denial. The jury returned a verdict for plaintiff and defendants appealed.

The defendants are husband and wife. There is no dispute but what the defendant Alvina Wintsch spoke the words charged and there was evidence also that she likewise used similar language to other persons. The plaintiff was permitted to prove over defendants' objections how plaintiff appeared when told what Mrs. Wintsch had said about her. The description was: "Well, she appeared very much distressed and grieved." The evidence was competent. [Madden v. Railroad, 50 Mo. App. 666; State v. Buchler, 103 Mo. 203.]

Mrs. Griffin was permitted to testify what she understood Mrs. Wintsch meant when she said of plaintiff, "she is not a decent woman; she lived with Mr. Brown as man and wife before they were married and occupied the same room and boarded with her;" that they were living together in adultery and fornication. The rule is, that where the language is unambiguous an innuendo is unnecessary; and where the words are actionable *per se* an innuendo limiting their meaning may be disregarded. [Callahan v. Ingram, 122 Mo. 355; Michael v. Matheis, 77 Mo. App. 556.] Applying the foregoing rule to the testimony of the witness, it was

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a matter of no importance. It could have had no bearing on the issue, as the meaning of the words charged was obvious and the statement of the witness could have had no effect whatever on the mind of the jury.

The defendants contend that three separate causes of action were stated in the same count and that instructions numbered one, two and three given for plaintiff authorized a distinct recovery on each. In order to understand the effect of said instructions they should be read in connection with instruction numbered five. They are as follows:

1. "The court instructs the jury that if you find and believe from the evidence that the defendants, Alvina A. Wintsch and Henry Wintsch, were, on or about the first day of June, 1899, husband and wife, and that on said date said defendant, Alvina A. Wintsch, in the city of Kansas City and State of Missouri spoke of and concerning the plaintiff to one Martha Rose the following words: 'That Mrs. Brown had lived with her husband as man and wife before they were married, and that she was not a decent woman to associate with,' then the law presumes that said statement was untrue and was made maliciously and your verdict will be for the plaintiff and against both of the defendants."

2. "The court instructs the jury if you find and believe from the evidence that said defendants, Alvina A. Wintsch and Henry Wintsch, were, on or about the first day of August, 1899, husband and wife, and that on said date said defendant, Alvina A. Wintsch, in the city of Kansas City, State of Missouri, spoke of and concerning the plaintiff to one Mary E. Duke the following words: 'That Mrs. Brown was not a decent woman as she had lived with her husband, Mr. Brown, in adultery before they were married,' then the law presumes that said statement was untrue and maliciously made and your verdict will be for the plaintiff and against both of the defendants."

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3. "The court instructs the jury that if you find and believe from the evidence that on or about the 15th day of April, 1899, the defendants herein were husband and wife and that on or about said date said defendant, Alvina A. Wintsch, in the city of Kansas City and State of Missouri, spoke of and concerning the plaintiff to Mrs. S. D. Griffin the following words: 'That Mrs. Brown was not decent and for me not to associate with her, and that she had lived with Mr. Brown as man and wife before she married him,' then the law presumes that said statement was untrue and was maliciously made and your verdict will be for the plaintiff and against both of the defendants."

5. "The court instructs the jury that if they find for the plaintiff they will assess her damages at such a sum as they may believe from the evidence will compensate her for the damage to her reputation and good name, if you believe her reputation and good name have been damaged, and for the mortification and humiliation and mental suffering endured by her, if you believe she did so suffer, by reason of the speaking by the defendant, Alvina A. Wintsch, the words quoted in instructions numbered one, two or three, if you believe the defendant, Alvina A. Wintsch, spoke said words, not to exceed, however, the sum of five thousand dollars."

In an action for slander different sets of words spoken on different occasions may be set forth in the same count and included in the same cause of action. [Pennington v. Meeks, 46 Mo. 217.] As a matter of course there can be but one general finding, as there is but one count in such instances. It cannot be successfully disputed but that the plaintiff may recover upon one or more or all the sets of words charged to have been spoken, but there can be no separate recovery for each. The instructions given were separately directed to the three sets of words charged to have been spoken and the jury were told in each instance if it found the

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words were spoken to find for plaintiff. But in instruction numbered five the jury were told if they found the words were spoken as quoted in instructions numbered one, two or three they would find for plaintiff in a sum not to exceed $5,000. This instruction in effect was a direction for a general finding by the jury. And the jury so understood it. The jury under the instructions may have found each and all the different sets of words charged to have been spoken had been proven, yet it was clear enough they could make only one general finding; and that a finding on one or more of said instructions numbered one, two and three separately was not intended or directed.

Objection is made to instruction numbered one on the ground that it did not submit to the jury the questions whether the plaintiff was an unmarried woman, or whether the innuendo was sustained. There was no doubt but what plaintiff at the time of the alleged speaking of the words was an unmarried woman. There was no controversy and no evidence offered to rebut plaintiff's evidence on that point. It is not necessary to call the attention of the jury to an undisputed fact, and it may be assumed to exist as such in an instruction. As there was no ambiguity in the words charged, and as their plain import was that plaintiff had been guilty of the crime of fornication, proof of the innuendo would have been surplusage.

One of the charges is that "plaintiff was not a decent woman as she had lived with her husband, Mr. Brown, in adultery before they were married." The plaintiff being a *feme sole* at the time could not have been guilty of the crime of adultery. There was no objection made to this allegation of the petition. But the defendants objected to plaintiff's instruction authorizing a recovery for the speaking of the words charging her with adultery. In Christal v. Craig, 80 Mo. 367, it was held: "The statement of a cause of action for slander, for words imputing to a woman the crime of

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adultery, should contain an averment of her coverture, and in the absence of such averment, no instruction should be given as to said cause of action." And it was there also held that, if one or more of the causes of action united in the same count be fatally defective for a failure of sufficient statement of facts to constitute a cause of action, a general verdict is erroneous as to all of the causes of action. There is authority for a construction different from that announced in Christal v. Craig, supra. In Walton v. Craig, 7 Sergeant & Rawles (Pa.), 449, the court held that, notwithstanding the declaration charged that at the time the words were spoken the plaintiff was a married man, and the proof showed that the language used imported that he had committed fornication, the proof sustained the charge. The court said: "The rule is now well established that no inconsistency or want of grammatical propriety will prevent the words from being actionable when the intention to charge the party with a crime clearly appears, and when a criminal charge is conveyed by the defendant's expression. The liability to make reparation cannot be affected by any impropriety in the communication, whether legal or grammatical, when the loss of character and its probable consequences constitute the ground of action, though the act charged is in legal strictness impossible." And such seems to have been decided as early as the time of Judge Holt.

Independently speaking, and without reference to these authorities, it seems to us that the statute in question unqualifiedly makes the language used here actionable. It reads: "It is actionable to publish falsely and maliciously in any manner whatsoever, that *any person* has been guilty of fornication or adultery." We have italicised the words *any person*. It seems to have been the intention of the Legislature to do away with all technical distinction and to make the speaking of the words "adultery" or "fornication" actionable *per se* as to any person, without reference to the fact that such

person may or may not be married. Apparently, the object of the statute was to afford reparation for the actual injury suffered. To say of a single woman that she has committed the crime of adultery is equally as injurious in its effects as to charge a married woman with the same offense. It is the poison that the language implies, and not its legal significance, that the statute contemplates.

But my associates are of the opinion that the case of Christal v. Craig has no application to the question here—that it refers only to pleading. Let us see. The court said, "the first of the charges, it is observed, is that of adultery. Are the facts stated sufficient to constitute the offense? Section 2120, Revised Statutes 1879, makes it actionable to publish falsely that any person has been guilty of adultery. The term 'adultery' is employed in this statute in its common-law sense or its ordinary acceptation. For the plaintiff, a woman, to be guilty of this offense, she must have been married at the time." See page 372 opinion. It seems that the court decided that not only the pleadings should allege that the plaintiff was a married woman at the time of the speaking of the slanderous words, but also that only a married woman could commit the offense. And, further, that the common-law sense of the term and its ordinary acceptation were the same. To my mind, there can be no doubt what the court meant. The language is too plain for controversy. If said case is to be followed, said instruction numbered two should not have been given.

SEPARATE OPINION.

ELLISON, J.—The statute itself (section 2863, Revised Statutes 1899) makes it slander *per se* to falsely charge a person with being guilty of adultery or fornication. [Stieber v. Wensel, 19 Mo. 513.] With-

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out the statute, the law both in England and many of the States, seemed to be that a charge of unchastity (where it was not made a crime) was not actionable without proof of special damage. [Folkard's Starkie on Slander, 128, 129; Odgers on Slander, 84-87.]

This was always considered unsatisfactory and unjust, and so to settle the matter our Legislature declared flatly, that to charge a person with either of those immoral acts was slander *per se,* damages following, as of course, without proof of special damage. The Legislature probably had in mind only the idea of making certain the law in these instances where justice so clearly demanded it. The Legislature had no further intention than that. By use of the words "*any* person has been guilty of adultery or fornication," it was not intended to include any person who could not commit the sexual act which is called either adultery or fornication. As, for instance, a nursing babe would be included in the phrase "any person," and yet, the statute did not include such. To say of a four-year-old boy that "he is only four years old, but he has committed adultery," would not be slander, because a boy of that age is incapable of the sexual act which is called adultery, and the charge would have carried along, on its face, its own refutation. The statute, as just stated, only intended to make certain that it was actionable *per se* to charge anyone with adultery or fornication, that is, anyone who could commit the act which is denominated adultery or fornication. That was all, I think, that was in the legislative mind. Therefore, I do not regard the statute as cutting any figure or aiding plaintiff by the use of the expression "any person."

But aside from the expression "any person," the charge of either adultery or fornication is a charge of a disgraceful and immoral act, and when made it means, and is understood to mean, immoral and unlawful sexual intercourse, without regard to whether the party charged is married or single. Adultery and

fornication are the same act, but committed by different actors, and, therefore, when one is falsely charged with either, whether married or single, it is actionable *per se.* This view is sustained by an interesting case in Pennsylvania where the court had under consideration the charge of fornication, though the party charged was a married man. It was there contended that the charge could not possibly be true. But the court said that "courts and juries will understand words in the same way other people would. We are not to examine dictionaries nor turn to our law books to find out their legal technical meaning. . . . Can it be seriously doubted but that the defendant intended to defame the plaintiff, and charge him with unlawful sexual intercourse?" Further on, the court said: "The objection is, that being a married man, he could not commit fornication, which is but saying the speaker mistook the legal name of the offense. . . . In many cases the action will lie, notwithstanding there is repugnance in the words themselves or made so by matters apparent on the record; as if one say of a widow having children born in wedlock, she is a whore and her children are bastards. Now though the children born in wedlock, cannot possibly be bastards, yet they may be reported such. . . . The cases of charging one with the murder of a man living, not being actionable, because impossible, were not much respected by Lord HOLT, who, in such case, observed, the fault is greater, it is a double crime." Continuing, the court said: "The rule is now well established that no inconsistency or want of grammatical propriety will prevent the words from being actionable when the intention to charge the party with a crime clearly appears, and when a criminal charge is conveyed by the defendant's expression. The liability to make reparation, cannot be affected by any impropriety in the communication, whether legal or grammatical, when the loss of character and its probable consequences, constitute the ground of action, though the

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act charged is in legal strictness impossible." [Walton v. Singleton, 7 Sergeant and Rawles 450.] To the same effect are the cases of Beirer v. Bushfield, 1 Watts 23, and Andres v. Koppenheafer, 3 Sergeant and Rawles 255. Those cases were discussed at length and approved by the Supreme Court in Hudson v. Garner, 22 Mo. 423.

But it is suggested that we are bound by the case of Christal v. Craig, 80 Mo. 367. I do not think that case applicable to the one in hand. In that case the word "adultery" was not used by the defendant. The words spoken were, "your son Lin has no father. He never did have any. He is not Stewart Christal's child," which the plaintiff construed to mean a charge of adultery; and so she alleged in her petition that the defendant "thereby intended to charge plaintiff with adultery." The court ruled that the *pleader* should have added that plaintiff was a married woman, as only a married person could commit adultery. The question in the case at bar was not before the court and was not considered. I apprehend that if the defendant in that case had expressly charged the plaintiff with adultery the court would not have held that he could have excused himself by showing plaintiff to be an unmarried woman; or if defendant had charged her with fornication, that he could have excused himself by showing she was married. For, in either instance, the same immoral and scandalous sexual act would have been charged, equally hurtful, whether the defendant was married or single. Affirmed. *Smith, P. J.,* concurs.

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L. V. HARKNESS et al., Appellants, v. FRANK JARVIS et al., Respondents.

Kansas City Court of Appeals, January 20, 1902.*

1. **TRIAL PRACTICE: Judgment by Default: Motion to Set Aside: Subsequent Term: Continuance: Jurisdiction.** A motion to set aside a judgment by default filed more than four days after the judgment entry and not reached during the term, carries the case over to the next term without general or special orders of continuance and gives the court jurisdiction at such term to set the judgment aside.

2. ———: ———: ———: ———: ———: ———. Head v. Randolph, 83 Mo. App. 284, disapproved.

3. ———: ———: ———: **Discretion of Court: Appellate Practice.** The trial court has large discretion in acting on motions to set aside judgments by default and the appellate court is less apt to interfere with such discretion when the judgment is set aside than when it is not.

Appeal from Jackson Circuit Court.—*Hon. John W. Henry,* Judge.

REVERSED AND CERTIFIED TO THE SUPREME COURT.

J. C. Williams and *L. A. Laughlin* for appellants.

H. S. Hadley for respondents.

ELLISON, J.—Plaintiff brought this action returnable to the January, 1901, term to recover judgment on a promissory note. There was personal service on defendants but when the case was called for trial at said January term, defendants did not appear, neither did they file an answer. Judgment was rendered for plaintiff by default. After the expiration of

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the four days' time allowed for motions for new trial and in arrest of judgment, but at the same term, the defendants filed a motion to set aside the judgment for reasons therein alleged. The motion was not acted on by the court at that term, but went over to the following April term, without any special order of continuance. At the latter term the motion was sustained and plaintiffs have appealed.

The plaintiffs challenge the power of the circuit court to set aside the judgment on the motion aforesaid, made at a subsequent term. They agree that the court had the power to do so at any time during the term. And that though the motion was filed more than four days after the judgment, if the court had taken it up during the term and continued it, such action would have carried it over to the succeeding term with power in the court to act upon it. But they contend that not having been taken up and continued, the court's power ended with the term. They are sustained in this view by the majority opinion of the St. Louis Court of Appeals in Head v. Randolph, 83 Mo. App. 284, Judge Biggs dissenting. We find ourselves in disagreement with that court. The Supreme Court held that a motion to set aside a judgment filed more than four days after it was rendered, but at the same term, may be continued to a succeeding term and then decided. [Childs v. Railroad, 117 Mo. 414, 425.] So, therefore, the only question for us to decide is whether a motion filed during the term but more than four days after the judgment, and not reached or acted on, is continued over to the next term of court in the absence of its being called up and continued over, or of a general order of continuance. It is undeniable that the legal right exists to file the motion during the term after the four days' limit. It becomes a part of the proceeding in the case and the fact that it remains undisposed of at the end of the term, must show that it was intended to be carried over to the next term. If pending cases

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are not continued by special order and no general order is made, no one would suppose that such actions would abate. The practice in this State has been to continue docketing such cases in such instances, until disposed of. So a motion for new trial which is undisposed of is continued over to succeeding terms without either a special or general order. [Givens v. Van Studdiford, 86 Mo. 149; St. Francis Mill Co. v. Sugg, 142 Mo. 364.] It being clear that a cause undisposed of and a motion for new trial filed within four days and undisposed of, are each continued to the succeeding term without an order, it ought to be equally clear that no order is necessary to carry over an undisposed of motion for new trial filed without the four days. The court has no power to pass on either motion at a subsequent term except by force of the continuance, and we cannot see why a continuance would be allowed without an order in the one and denied in the other. If it be conceded that the court has the power to continue a motion filed after the four days by taking it under advisement until the next term, it must follow that the motion can be continued without being under advisement, for if it is a question of power the court cannot, of course, hold a matter under advisement beyond the period in which it has the power to act. The whole matter, it seems to us, is this: the continuance to a subsequent term carries along the power to act at that term, and such continuance is had when the motion is undisposed of, without an order either general or special. [Authorities supra.]

There need be little said on the merits of the motion. The Supreme Court has many times stated and enforced the proposition that large discretion rests with the trial court in acting on motions to set aside judgments by default. [Bank v. Armstrong, 92 Mo. 265, 280, and authorities cited.] And it has been said that it is less apt to interfere with such discretion where the judgment is set aside than when it is not. This for the

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reason that when set aside, the case is yet open and that justice will yet be done. [Helm v. Bassett, 9 Mo. 55.] And the courts of appeals have followed this view. [Longdon v. Kelly, 51 Mo. App. 572; Ensor v. Smith, 57 Mo. App. 584.] The record in this case does not disclose anything whereby we can be justified in saying that the discretion was abused.

But our decision on the first point being contrary to that of the St. Louis Court of Appeals in Head v. Randolph aforesaid, we order the case certified to the Supreme Court as required by the Constitution. All concur.

MARY J. EDGER, Respondent, v. ANNA KUPPER, Appellant.

Kansas City Court of Appeals, February 6, 1905.

1. **APPELLATE PRACTICE: Conflicting Evidence: Jury.** Where there is a conflict of evidence the appellate courts will not interfere with the finding of the jury.

2. **TRIAL PRACTICE: Instructions: Harmless Error: Verdict.** An instruction should limit the amount of plaintiff's recovery to the sum alleged in the petition, but where the verdict is less than such amount the error is harmless.

3. ———: ———: **Evidence.** Where there is some evidence an instruction that there is none should be refused, and on the other hand instructions should not be given without evidence to support them.

4. ———: ———: **Matters Covered:** Instructions should clearly and concisely present the issues without unnecessary repetition, and it is not error to refuse instructions on the matters covered by other instructions.

5. **EVIDENCE: Pleading: Witnesses' Credibility.** Evidence of matters not in issue under the pleadings should not be admitted nor should evidence tending merely to prejudice a party before the jury for the simple purpose of discrediting him.

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6. **TRIAL PRACTICE: Attorney's Remarks: Objection.** It is too late to complain of the conduct of an attorney for the first time in a motion for new trial. Such concerns are matters of exception and must be brought up by bill of exceptions.

Appeal from Jackson Circuit Court.—*Hon. James Gibson,* Judge.

AFFIRMED.

Kelly & Buchholz and *T. B. Buckner* for appellant.

(1) The court committed error in giving instruction numbered one as prayed by the plaintiff. This instruction makes no limit on the amount plaintiff could recover from the defendant. Wright v. Jacobs, 61 Mo. 19; Van Riper v. Morton, 61 Mo. App. 444; Wagner v. Ptg. Co., 45 Mo. App. 6; Shockley v. Fisher, 21 Mo. App. 551; Armstrong v. St. Louis, 3 Mo. App. 100; Ashby v. Shaw, 82 Mo. 76. (2) Error in instructions is presumably prejudicial in the absence of a showing that it is harmless. Camp v. Railroad, 94 Mo. App. 272; Hollenbeck v. Railroad, 141 Mo. 107; Dayharsh v. Railroad, 103 Mo. 570; Skinner v. Stifel, 55 Mo. App. 9; Railroad v. O'Reilly, 158 U. S. 334; Gilmer v. Highley, 110 U. S. 47. (3) The court erred in refusing to sustain defendant's demurrer to the evidence and in refusing to give instruction numbered one as prayed by the defendant. Dalrymple v. Craig, 149 Mo. 345; Gage v. Trawich, 94 Mo. App. 311; Boggess v. Railroad, 118 Mo. 328; Weimberg v. Railroad, 139 Mo. 286. (4) The court erred in refusing to give instructions numbered six and seven as prayed by the defendant. There was no evidence the defendant ever knew that plaintiff was either acting, assuming to act or claiming to act as manager of said hotel. Adm'x v. College, 41 Mo. 309; Hughes v. Vanstone, 24 Mo. App. 641; Carter v. Phillips, 49 Mo. App. 323; Painter v. Ritchey, 43 Mo. App. 112; Kammerman v. Wiggington, 70 Mo. App. 480. (5)

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The court erred in refusing to give instructions numbered eight and nine as prayed by the defendant. Nordyke v. Kehler, 155 Mo. 643; Crapson v. Wallace Bros., 71 Mo. App. 682. (6) The court erred in refusing to give instruction numbered ten as prayed by the defendant. Adm'x v. College, 41 Mo. 309; Kammerman v. Wiggington, 70 Mo. App. 480. (7) The court erred in refusing to allow defendant to show that plaintiff received her board and room and laundry as a part of the emoluments and compensation for her services. Chamberlain v. Cobb, 32 Iowa 161; Francis v. Shrader, 67 Ill. 272; Upson v. Raiford, 29 Ala. 188; Dix v. Marcy, 116 Mass. 416; 1 Beach on Contracts, sec. 582; Estes v. Shoe Co., 155 Mo. 577; Cook v. Bates, 88 Maine 455; Fletcher v. Massey, 49 Ill. App. 36. (8) The court erred in refusing to allow the defendant to show that plaintiff was a double grass widow. (9) The court erred in overruling defendant's objection to the hypothetical question propounded by plaintiff's attorney to witness Campbell. State v. Palmer, 161 Mo. 452. (10) Improper remarks made by attorneys for the plaintiff in their addresses to the jury. Killoren v. Dunn, 68 Mo. App. 212; Nichols v. Metzger, 43 Mo. App. 607; Miller v. Dunlap, 22 Mo. App. 97; Gibson v. Ziebig, 24 Mo. App. 67; Carder v. Prum, 64 Mo. App. 96; McDonald v. Cash, 45 Mo. App. 79.

Stewart Taylor and *J. D. McCue* for respondent.

(1) The plaintiff demanded judgment for the sum of $1,620, as a balance due her for services rendered the defendant. The verdict of the jury is for the sum of $607.50. It, therefore, affirmatively appears that the instruction was not prejudicial to the defendant. Wagner v. Ptg. Co., 45 Mo. App. 6. (2) The defendant by proceeding with the trial waived the supposed error in overruling her demurrer. She cannot urge that here. The case now rests on the evidence given on the trial,

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and this court will not now examine the evidence to see whether the demurrer was well taken. Felix v. Bevington, 52 Mo. App. 407; Price v. Barnard, 65 Mo. 651; Jennings v. Railroad, 112 Mo. 268; Hiltz v. Railroad, 101 Mo. 36. (3) The rule is well settled in this State that a demurrer to evidence will not be sustained if there is any evidence which tends to support the plaintiff's claim, and in weighing the evidence the court will consider it in the light most favorable to the party offering it, and draw therefrom all reasonable inference which the jury might draw. Young v. Webb City, 150 Mo. 341; Bank v. Simpson, 152 Mo. 656; Noenger v. Voyt, 88 Mo. 589; Bender v. Railroad, 137 Mo. 240; Buesching v. Gas Co., 73 Mo. 219; Fisher v. Railroad, 23 Mo. App. 201; Zwissler v. Storts, 30 Mo. App. 163; Baird v. Railroad, 146 Mo. 281; Kattleman v. Fire Assn., 79 Mo. App. 452; Roe v. Annan, 80 Mo. App. 198; Cook v. Railroad, 63 Mo. 402; Stewart v. Sparkman, 69 Mo. App. 549; Glennon v. Gas Co., 145 Mo. 503; Gutridge v. Railroad, 105 Mo. 520; Damhorst v. Railroad, 32 Mo. App. 356; Rontsing v. Railroad, 45 Mo. 236; Emmerson v. Sturgeon, 18 Mo. 589; Samuel v. Parker, 28 Mo. App. 365; Twohey v. Frim, 96 Mo. 104. (4) The defendant did not plead payment or set-off. Her answer was a general denial, and this evidence was wholly outside the issues in this case.

JOHNSON, J.—Action on contract alleged in the petition to have been verbally made between plaintiff and defendant for the employment of plaintiff as "resident manager" of a family hotel operated by defendant in Kansas City, Missouri. Employment is alleged to have begun on February 1, 1900, and continued for a period of twenty-two and one-half months. Plaintiff says in her petition that no definite amount of salary was agreed upon between her and defendant but that defendant agreed to pay her "a reasonable and fair compensation therefor," and that $100 per month is

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the reasonable value of her services. She admits receiving payments on account of services performed under said contract aggregating in amount $630, which being applied as a credit on account leaves a remainder, so she alleges of $1,620 due her from defendant, for which sum with interest she prays judgment.

The answer is a general denial. A trial of the cause after issue joined resulted in a verdict and judgment in favor of the plaintiff in the sum of $607.50 from which after unsuccessfully moving for a new trial and in arrest of judgment defendant prosecutes this appeal.

The evidence is conflicting. Plaintiff on her part introduced substantial evidence in support of the allegations of her petition. Defendant introduced evidence supporting her contention that plaintiff's employment was not as resident manager but as housekeeper; that the amount of wages plaintiff was to receive was agreed upon and the payments received settled in full her compensation. The jury decided this conflict in plaintiff's favor. The trial court, in passing upon the motion for new trial, refused to set aside the verdict as being against the weight of the evidence. Many of the points made by defendant in her brief are predicated either upon the assumption that there was no evidence to sustain the verdict, or that it was against the weight of the evidence. There was sufficient evidence for the jury to consider. In a situation such as this we do not interfere.

Complaint is made of instruction numbered one given on behalf of plaintiff because it failed to limit the amount of recovery to the amount claimed in the petition. This was error but it was not prejudicial to defendant, the amount of the verdict being much less than that claimed in the petition. [Wagner v. Printing Co., 45 Mo. App. 6.]

Instructions numbered six and seven asked by defendant were properly refused. They told the jury in

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substance there was no evidence that plaintiff was employed by defendant as manager, or that defendant knew that plaintiff was assuming the duties of that position. The rule invoked by defendant in aid of these instructions that, one who voluntarily performs a service for another without the existence of an intention that he is to be paid therefor cannot recover for such services, is without application, for the reason that there was abundant evidence to go to the jury on that very issue—which was the principal bone of contention in the case.

Nor was any error committed in refusing instructions numbered eight, nine, ten and eleven prayed for by defendant, all of which were fully covered by other instructions given on behalf of defendant. [Culverson v. Maryville, 67 Mo. App. 343.]

It is the office of instructions to clearly and concisely present the issues to the jury without unnecessary repetition. Reiteration has a tendency to confuse and mislead by giving undue prominence to certain features of the case, and should be avoided.

We have considered all of the points made by appellant in criticism of the action of the court in the giving and refusing of instructions and find no merit in any of them. The case was fairly presented to the jury.

In ruling upon the admission of evidence offered the learned trial judge was also free from error. The question of board, room and laundry furnished the plaintiff was not in issue either under the pleadings or the admitted facts in evidence. Witness Campbell was competent to testify upon the subject of the value of plaintiff's services and the hypothetical question asked him was based upon plaintiff's evidence as well as upon that of other witnesses. It certainly was not proper for defendant to probe into plaintiff's matrimonial affairs. Whether or not she is a "double grass widow" has no bearing upon any of the issues of this case, and

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its proof could be offered for no other purpose than to weaken plaintiff's credibility as a witness—and for this purpose it was not competent; nor did such matrimonial misfortunes, if they existed, even tend to convict plaintiff of being "something of an adventuress" as urged in appellant's brief. Such evidence evidently was intended to prejudice plaintiff before the jury, and was properly excluded.

Finally, much is said by appellant relative to improper remarks made by plaintiff's attorneys in their arguments to the jury. It is unnecessary for us to consider the propriety of the statements in question or the correctness of the action of the court with respect thereto. The bill of exceptions fails to show the remarks complained of, or that any exception was saved. The point is made for the first time in the motion for new trial and is supported by affidavits. We held in the case of Norton v. Railroad, 40 Mo. App. 649, "the rule in this State is that, improper remarks of counsel are matters of exception and should be shown by the bill of exceptions and not brought to the attention of the trial court by affidavits in support of motions."

The judgment is affirmed. All concur.

FERD HEIM BREWING COMPANY, Appellant, v. KATE JORDAN, Administratrix, etc., Respondent.

Kansas City Court of Appeals, February 6, 1905.

PRINCIPAL AND SURETY: Surety's Payment: Equitable Assignment: Limitation. Where a surety pays his principal's note the payment operates as an equitable assignment thereof to the surety who thereby becomes possessed of all rights and remedies which the creditor had at the time, and in equity may maintain an action for subrogation any time within ten years from maturity of the note, notwithstanding limitation may have run against his action at law.

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Appeal from Jackson Circuit Court.—*Hon. W. B. Teasdale,* Judge.

REVERSED AND REMANDED.

Hardin, Taylor & Mosby for appellant.

(1) Appellant, on paying the money to the bank, took its place, and stands in its shoes as to the note. It is not suing at law in assumpsit, upon an implied promise on Jordan's part to refund the money it paid for him; but it is asking to be subrogated to the rights which the bank, Jordan's creditor, had for the same debt. George v. Somerville, 153 Mo. 16; Storts v. George, 150 Mo. 8; Hackett v. Watts, 138 Mo. 517; Benne v. Schnecko, 100 Mo. 257; Humphreys v. Milling Co., 98 Mo. 553; Blair v. Railroad, 89 Mo. 393; Ferguson v. Carson, 86 Mo. 679; Hammons v. Renfrow, 84 Mo. 341; Butler v. Lawson, 72 Mo. 227; Church v. Robberson, 71 Mo. 334; Berthold v. Berthold, 46 Mo. 557; Furnold v. Bank, 44 Mo. 336; Arnot v. Woodburn, 35 Mo. 99; Miller v. Woodward, 8 Mo. 169; Arn v. Arn, 81 Mo. App. 137; Harper v. Kemble, 65 Mo. App. 517; Fisher v. Association, 59 Mo. App. 435; Clark v. Bank, 57 Mo. App. 282; Coal Co. v. Slevin, 56 Mo. App. 107; Harper v. Rosenberger, 56 Mo. App. 388; Roberts v. Bartlett, 26 Mo. App. 617; 1 Brandt on Suretyship, secs. 269, 270, 271; Bispham's Prin. Eq., secs. 335, 336; Beville v. Boyd (Tex.), 42 S. W. 318, 41 S. W. 670; Carpenter v. Minter (Tex.), 12 S. W. 180.

John L. Wheeler for respondent.

(1) The payment of the note by appellant extinguished the note and appellant's action was at law either in assumpsit or under section 4504, Revised Statutes 1899. Miller v. Woodward, 8 Mo. 175; Burton v. Rutherford, 49 Mo. 255; Halliburton v. Carter, 55 Mo.

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435; Blake v. Downey, 51 Mo. 437; Hearne v. Keath, 83 Mo. 89; Burkhartt v. Helfrich, 77 Mo. 376; Bauer v. Gray, 18 Mo. App. 169; Harper v. Kemble, 65 Mo. App. 518; Williams v. Gerber, 75 Mo. App. 30. (2) Appellant's action being at law it was barred by the five-year Statute of Limitation, at the time of the death of Jordan, and respondent had the same right to set up this statute as a bar that Jordan had. R. S. 1899, sec. 4273; Harper v. Eubank, 32 Mo. App. 259; Kreeder v. Isenbise, 123 Ind. 10; Rodman v. Hedden (N. Y.), 10 Wend. 498; Burnham v. Galloway, 13 Iowa 68; Wilson v. Crawford, 46 Iowa 19; Robinson v. Jennings, 70 Ky. 530; Godfrey v. Rice, 59 Maine 308; Wheeler v. Young, 143 Mass. 143; Scott v. Nichols, 27 Miss. (Cush.) 94.

JOHNSON, J.—The undisputed facts in this case are that the defendant's intestate, Samuel Jordan, executed his note with the plaintiff as surety thereon to the Missouri National Bank for $500; that said Jordan failing to pay the note at maturity, plaintiff—his surety—was compelled to pay it; that Jordan has since departed this life and defendant is administratrix of his estate. This is a suit in equity by which the plaintiff seeks to be decreed to be the equitable assignee and owner of said note and subrogated to all the rights and remedies of the payee thereunder. It is conceded that this suit was not brought until the lapse of more than five years after plaintiff had been compelled to pay the note, but it was brought within ten years from the date of the maturity of the note. There was a trial resulting in a decree for defendant, from which plaintiff appealed.

Two remedies at law were open to plaintiff upon payment of the note: an action at common law for money paid on his principal's account; and an action under the provisions of sections 4504 and 4505, Revised Statutes 1899. The main question in the case is, did the plaintiff at the time of the payment of the note also

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possess a concurrent equitable remedy to sue upon the note itself as its equitable assignee and owner? The answer to this question in turn depends upon the solution of another, i. e., Did the payment of the note by the surety operate as an extinguishment of the debt, or, did it have the effect of an equitable purchase by the surety of the note from the creditor and thereby vest in him all the rights and remedies possessed by the creditor thereunder?

If the debt was extinguished, the creditor holding no securities therefor, subrogation would not inure to the surety, and he would be thrown back upon his remedies at law; but if by payment he became the equitable assignee and owner of the note, he necessarily was clothed with all of the creditor's rights and could pursue, upon the note itself, in equity, the same course within the same time that the creditor could at law had he remained the owner of the note. One of two propositions must be true; either the surety by payment stands in the creditor's shoes possessed of all his rights and remedies; or else, with respect to the obligation itself, he does not take the place of the creditor, has none of the creditor's rights and remedies thereunder, and subrogation can aid him only with respect to any securities, etc., which the creditor may hold for the debt. Therefore, it will not do to say in a suit such as this, brought by the surety, that limitation will shut out the surety in a shorter period of time than it would the creditor in an action brought by him upon the note, had payment not been made. The surety either gets all of the creditor's rights and remedies by constructive purchase, or he gets none. Conduct of the surety with respect to the time of bringing suit in equity will not constitute laches which, if the act of the creditor, would have been due diligence.

Nor does it affect the surety's remedy in this action that limitation has run against an action at law.

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He had the right upon payment to proceed at law either in assumpsit or under the statute to recover the money paid out by him on his principal's account; and he also had the right to treat himself as the owner in equity of the note and to proceed accordingly, without reference to his legal remedies.

Limitations being disposed of, we revert to the main question: Was the note extinguished or equitably assigned as the result of the surety's payment? We must hold, under the following authorities, that the payment operated as an equitable assignment of the note, and that the surety thereby became possessed of all rights and remedies which the creditor had at that time. [George v. Somerville, 153 Mo. 7; Storts v. George, 150 Mo. 1; Hackett v. Watts, 138 Mo. 502; Benne v. Schnecko, 100 Mo. 250; Humphreys v. Milling Co., 98 Mo. 542; Blair v. Railway, 89 Mo. 383; Ferguson v. Carson, 86 Mo. 673; Hammons v. Renfrow, 84 Mo. 332; Butler v. Lawson, 72 Mo. 227; First Baptist Church v. Robberson, 71 Mo. 334; Berthold v. Berthold, 46 Mo. 557; Furnold v. Bank, 44 Mo. 336; Arnot v. Woodburn, 35 Mo. 99; Miller v. Woodward, 8 Mo. 169; Arn v. Arn, 81 Mo. App. 133; Harper v. Kemble, 65 Mo. App. 514; Fisher v. B. & L. Assn,. 59 Mo. App. 430; Clark v. Bank, 57 Mo. App. 277-282; Coal Co. v. Slevin, 56 Mo. App. 107; Harper v. Rosenberger, 56 Mo. App. 388; Roberts v. Bartlett, 26 Mo. App. 617; 1 Brandt on Suretyship, sections 269, 270, 271; Bispham on Prin. Eq., sections 335-36; Sheldon on Subrogation, pp. 159, 165.]

In England and in some of the States the rule is followed that payment by the surety extinguishes the debt, and the surety becomes subrogated only to such securities, etc., as the creditor may hold. But in this and many other States, as will appear from the authorities above cited, the rule is well settled that the debt itself is assigned without regard to securities. In Berthold v. Berthold, supra, the Supreme Court

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through Judge BLISS said: "So in the United States, though not in England, it is held that a surety who pays the debt of the principal is entitled to an assignment of the instrument paid. . . . So when the second obligation turned out as collateral is paid the original instrument, so far as the creditor is concerned, is paid and extinguished, but is still alive in favor of him who has paid it, and he should be permitted to avail himself of any right in regard to it to which its purchase would entitle him." The principle there stated has been repeatedly reannounced and the case cited with approval by the supreme and appellate courts. In Benne v. Schnecko, supra, it was recognized as settled law. "Mere payment of the debt by the surety is considered to operate as an assignment of it to the party paying with all the rights and liens which attached to it as incidents in the hands of the creditor." And in Storts v. George, supra, l. c. 8, the rule is given the broadest scope: "No principle is better settled than that when a surety pays the debt of his principal he by reason thereof becomes entitled in equity to all of his rights, *remedies,* securities, funds, liens and equities which the creditors may have for the same debt."

The case of Burton v. Rutherford, 49 Mo. 255, much relied upon by respondent, is not in conflict with the rule announced. That was an action *at law* brought by the surety who had elected to proceed not in equity as the owner of the debt but at law for money paid out by him for his principal. The court said, "this payment extinguished the note and gave the appellant a right to sue for money paid," etc. It is not out of harmony with the views herein expressed to say that after the surety has chosen not to avail himself of his equitable assignment but to sue at law the debt might be treated as extinguished to enable him to maintain his action. Evidently, the court in that opinion entertained this view, for it neither overruled nor criticised Berthold v. Berthold nor Furnold v. Bank,

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supra, both holding as we do here. But whatever may be the correct construction of that case, the rule we follow has been so often recognized in subsequent cases in the supreme and appellate courts that the case in question cannot be considered as a controlling authority against it.

So with the other cases in this State to which our attention has been directed by respondent. Most of them may readily be reconciled with the cases herein referred to. Those which apparently lean to the position contended for by respondent are found not to present the issue here involved. It is enough to say that the recent decisions of the Supreme Court sustain the rule laid down in Berthold v. Berthold, supra. The decree of the circuit court will be reversed and the cause remanded.

All concur.

WILLIAM LEICHER, Respondent, v. FRANK L. KEENEY, Appellant.

Kansas City Court of Appeals, February 27, 1905.

1. **APPELLATE PRACTICE: Second Appeal: Res Adjudicata.** When an appellate court determines questions of law properly before it on appeal and remands the case for trial its rulings become the law of the case and will not be re-examined on a subsequent appeal, except for very cogent reasons, none of which appear in this case.

2. **VENDOR AND VENDEE: Shortage of Acreage: Demurrer to Evidence.** The evidence relating to representations of the amount of acres in a land sale is examined and held sufficient to send the question to a jury.

Appeal from Pettis Circuit Court.—*Hon. Geo. F. Longan,* Judge.

AFFIRMED.

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Barnett & Barnett and *John Cashman* for appellant.

(1) The court erred in refusing the instruction asked by defendent at the close of plaintiff's evidence in the nature of a demurrer to plaintiff's evidence, and also erred in refusing the peremptory instruction asked by the defendant at the close of all the evidence, for the reason that the written contract in this case is plain and free from ambiguity and uncertainty. (2) It is the well-settled law that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, etc. If any other fraud is relied upon the remedy is by a direct proceeding in equity to avoid the instrument, and not an action at law for damages. (3) The party could have protected himself by providing in the contract that the farm should contain 160 acres and that it was sold at $22 per acre which he did not do. State ex rel. v. Jones, 131 Mo. 205; Hair Co. v. Walmsley, 32 Mo. App. 115; Carraugh v. Hamill, 110 Mo. App. 53; Johnson v. Ins. Co., 93 Mo. App. 580; Crim v. Crim, 162 Mo. 542; Wells v. Adams, 88 Mo. App. 215; Wood v. Murphy, 47 Mo. App. 547; Morgan v. Porter, 103 Mo. 135; Lewis v. Land Co., 124 Mo. 673; Mires v. Summerville, 85 Mo. App. 185. (4) All previous contemporaneous oral agreements are merged in the written contract. (5) The first count of the petition does not state a cause of action because it pleads in the alternative that the defendant misstated the number of acres either through mistake or fraud and that he does not know which. Both alternatives must state a good cause of action or the petition will be fatally defective. Huitt v. Truitt, 23 Mo. App. 443; Beall v. January, 62 Mo. 434; Patterson's Mo. Code Pleading, sec. 71. (6) The second count states no cause of action. While it alleges fraud it does not state any facts constituting fraud.

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Louis Hoffman, John D. Bohling and *Sangree & Lamm* for respondent.

(1) The court did not err in refusing the instruction asked by the defendant at the close of plaintiff's evidence, in the nature of a demurrer, nor in refusing the defendant's peremptory instruction at the close of all the evidence. Leicher v. Keeney, 98 Mo. App. 405; Bigelow on Fraud (1 Ed.), 174, 487; 1 Greenleaf on Evidence (15 Ed.), sec. 284; Liebke v. Methudy, 14 Mo. App. 72; Culp v. Powell, 68 Mo. App. 242; Railroad v. Curtis, 154 Mo. 22; Herman v. Hull, 140 Mo. 270; Bassett v. Glover, 31 Mo. App. 150, and cases cited; Stone v. Barrett, 34 Mo. App. 15; Aquirer v. Evans, 127 Mo. 518; Sprague v. Rooney, 104 Mo. 360; Childs v. Dobbins, 61 Ia. 114; Race v. Weston, 86 Ill. 91; Gooch v. Conner, 8 Mo. 391; Tyler v. Anderson, 106 Ind. 191; Match v. Hunt, 38 Mich. 1; Thomas v. Beebe, 25 N. Y. 244, and cases cited. So that the cause in this behalf was tried in accordance with the mandate of the court. (2) A party defrauded in a transaction, on discovery of the fraud, may stand by the contract and sue for damages resulting from the fraud and deceit. Shinnabarger v. Shelton, 41 Mo. App. 147; Owens v. Recto, 44 Mo. 389; Parker v. Marquis, 64 Mo. 38; Campbell v. Hoff, 129 Mo. 324; McGhee v. Bell, 170 Mo. 121. (3) When the fraudulent representations relate to the quantity of land sold or conveyed, it is immaterial whether the sale is by acre or in gross. Leicher v. Keeney, 98 Mo. App. 394; Thomas v. Beebe, 25 N. Y. 244; Tyler v. Anderson, 106 Ind. 191 and cases cited; Land Co. v. Simpson (Texas), 20 S. W. 953. (4) The first count was abandoned and the second count of the petition states the distinguishing facts and elements of a good cause of action for fraud. Thus: (a) Keeney's false representations, (b) his knowledge of their falsity, (c) his intention they should be relied and acted on,

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(d) Leicher's ignorance of their falsity, and (e) Leicher's reliance and acting thereon to his resulting damage. Bank v. Byers, 139 Mo. 652, and cases cited; Paretti v. Rebenack, 81 Mo. App. 494; Edwards v. Noel, 88 Mo. App. 434. (5) One who relies on false representations, under such circumstances, has his action for the ensuing injury, the gist of which is the fraud of the defendant. Delaney v. Rogers, 64 Mo. 201; Shinnabargar v. Shelton, 41 Mo. App. 147; Jarrett v. Morton, 44 Mo. 275; Nauman v. Oberle, 90 Mo. 666; Thomas v. Beebe, 25 N. Y. 244; Leicher v. Keeney, 98 Mo. App. 399. (5) Where a case which has been once before the appellate court again comes up, only such questions will be noticed as were not determined in the previous decision. Whatever was passed upon will be deemed *res adjudicata,* and no longer open to dispute. Overall v. Ellis, 38 Mo. 290; Grumley v. Webb, 48 Mo. 562; Hombs v. Corbin, 24 Mo. App. 393; McKinney v. Harral, 36 Mo. App. 337.

JOHNSON, J.—This is the second appeal in this case. The opinion of this court on the former appeal is reported in 98 Mo. App. 394. Plaintiff was there the appellant. He had been compelled to take a nonsuit because of an adverse ruling of the learned trial judge upon the admission of evidence based upon the view that the allegations of the petition failed to state a cause of action. We reversed and remanded the cause for a new trial. A second trial resulted in a judgment for plaintiff, and defendant appealed.

The petition is in two counts. We held the second count stated a cause of action. At the former trial after the exclusion of evidence tending to prove vital facts, plaintiff offered to prove by witnesses, "all the facts, allegations and statements stated in the petition." In the concluding paragraph of our opinion, after resolving the determinative questions of law involved in favor of plaintiff's right to recover under

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the averments of the petition, SMITH, P. J., observed: "Even if the plaintiff can make the proof embraced in his comprehensive offer, we are not entirely clear as to whether or not he ought to recover." It is defendant's position that because of this remark all points considered and decided in that opinion are now open to discussion and review. We do not agree with him.

We fully discussed and decided the several propositions of law which we deemed applicable under the allegations of the petition construing them in favor of plaintiff's right to recover and remanded the case for trial. If the trial court, following our mandate, as it was bound to do, has correctly applied the law we held controlled the rights of the litigants, we perceive no reason in this case for departing from the general rule that when an appellate court determines questions of law properly before it upon appeal and remands the case for trial, its rulings become the law of the case and will not be re-examined upon subsequent appeal, except for very cogent reasons, none of which appears in this case. The statement of the general rule and cause for exception thereto made in Hamilton v. Marks, 63 Mo. 172, has met with general approval in subsequent decisions of the Supreme Court. "It is fit and proper that there should be an end to litigation and when a rule has been adjudged upon mature deliberation and after solemn argument it ought to be considered as finally determined. When a case has once been in the appellate court and is sent back, if it is retried in conformity with the principles announced in the higher tribunal and is again taken up, cogent and convincing reasons must exist to induce a re-examination of what ought to be considered as *res adjudicata.* But in view of the fact that subsequent decisions of this court though not noticing or professing to overrule the decisions in this case are in my opinion inconsistent with it, and considering the import-

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ance of having some stable rule in reference to a question which so vitally concerns the business transactions of the whole community, it is deemed advisable to depart from the usual practice and consider the question again." [Keith v. Keith, 97 Mo. 223; Bank v. Taylor, 62 Mo. 338; Adair County v. Ownby, 75 Mo. 282; Gaines v. Fender, 82 Mo. 497; McKinney v. Harral, 36 Mo. App. 337; Printing Co. v. Protective Ass'n, 81 Mo. App. 467; Bird v. Sellers, 122 Mo. 23; Rutledge v. Railroad, 123 Mo. 131; Baker v. Railroad, 147 Mo. 152; Wells on Res Adjudicata and Stare Decisis, sec. 613; Roberts v. Cooper, 20 Howard 481.]

Defendant contends that his instruction in the nature of a demurrer to the evidence should have been given. The facts disclosed by the evidence introduced by plaintiff are as follows:

On February 25, 1898, the parties entered into a written contract under which defendant sold plaintiff a certain farm in Pettis county, therein described as the "Fowler farm," for the sum of $3,500. No further description was given beyond the statement that it was "situated in the north half of section eighteen, in township forty-six and range twenty-one, Pettis county." Nor was the acreage mentioned. Defendant had owned the land some five months before he sold it, but had lived in its vicinity a number of years. The situation of the land was such that it required a survey to determine the number of acres contained therein. Plaintiff was a farmer and an entire stranger to the land, his home being some ninety miles distant. He is a German possessed of a very limited knowledge of the English language, but evidently a man of ordinary intelligence and experience. He came to Sedalia in quest of land and enlisted the services of his brother-in-law, Charles Walch, who lived there, to assist him. They first encountered the real estate agents representing defendant who described the farm as containing 160 acres. Thereupon they inspected the land and

entered into negotiations with defendant for its purchase. Defendant stated that it contained 160 acres and asked $25 per acre. Plaintiff offered $20 and raised to $22, whereupon they figured to ascertain the total amount the farm would bring at this price and found it would be $3,520. Plaintiff then offered $3,500 for the farm. Defendant accepted the offer and the following day the parties met in Sedalia at the office of the agents where the contract was drawn and signed. Throughout these preliminary negotiations plaintiff exhibited considerable anxiety concerning the number of acres. He was unable to form a conclusion of his own on this point from his inspection of the farm and several times closely interrogated defendant about it, the last time being in the agent's office just before the contract was executed. On this occasion he proposed that a survey be made but defendant declined to agree, stating that he knew from a former survey the farm contained 160 acres. The agent, in addition, stated he knew defendant to be an honorable man and reliable in his statements. Walch also expressed the same opinion; and relying upon these assurances, plaintiff signed the contract. Plaintiff stated that the repeated representations made by defendant as to the number of acres and his assertion that his knowledge was based upon an actual survey, and therefore accurate, induced him to buy the land at the price agreed upon; and but for these he would not have purchased it. Some time after the deed was executed and delivered and possession given, plaintiff becoming convinced the farm fell short of containing the number of acres represented, caused a survey to be made, from which it was found the actual contents were some 141 acres.

The fact of the shortage as claimed is conceded. Defendant admitted in his testimony that the negotiations began upon a per acre basis. He wanted $25 per acre and plaintiff first offered him $20 and afterwards $22. We quote from his testimony as follows:

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"I wanted $25 an acre, they offered me $22, and we compromised on $3,500 for the farm. . . . I have no remembrance of telling them there was one hundred and sixty acres of land there; I won't say either way. But I did say the abstract and deed called for one hundred and sixty acres. . . . I don't remember all intermediate talk before I offered to take $3,500. . . . I don't think I ever gave Mr. Walch any definite answer as to why I would not make the shortage good. Well, the reason I didn't give Mr. Walch any definite answer was, I was unsettled about the business. I didn't know what to do about it just at that time. It was not settled as to whether I told them there was one hundred and sixty acres of land there. . . . I possibly said there was one hundred and sixty acres but I left off the word 'knew' because I did not know. All I had was the abstract and deed. . . . I had owned the land five or six months. Mrs. Keeney was Miss Fowler. She inherited a part of the land. . . . She had bought part of it from the other heirs. I had done some of the negotiating for her. . . . I had been on the farm many times. Had known it, I suppose, ten or twelve years. Married my wife there."

The evidence adduced was sufficient to justify its submission to the jury. It tended to prove the following facts:

First: Plaintiff was a stranger to the land, did not know the number of acres and could not ascertain that fact by inspection or ordinary investigation. Second: Defendant did know the acreage of the farm to be about nineteen acres short of 160 and knew of plaintiff's ignorance of that fact. Third: The price agreed upon was estimated upon a per acre basis and plaintiff would not have bought had be known of the deficiency, which fact was known to defendant. Fourth: Defendant for the purpose of deceiving plaintiff stated as a fact within his knowledge obtained from

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a previous survey that the farm contained 160 acres. Fifth: Plaintiff relied upon the false and fraudulent representations so made. These comprise all of the facts we held in our former opinion to be essential to plaintiff's right to recover, and we must now sustain the trial court in submitting the case to the jury.

Every other point made by defendant is fully determined by the former opinion and for the reasons herein expressed will not receive consideration here. The judgment is affirmed. All concur.

SOUTHWEST MISSOURI ELECTRIC RAILWAY COMPANY, Appellant, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Respondent.

Kansas City Court of Appeals, February 27, 1905.

1. **PLEADING: Action: Ex Contractu: Ex Delicto: Misjoinder: Repugnancy.** One count in a petition was on a contract that plaintiff and defendant would bear one-half of any damage resulting from the negligence of a common agent or their common negligence; the second count was on an agreement after the alleged negligence that the plaintiff should settle the whole damage and defendant thereupon would pay its half. *Held*, both actions are *ex contractu* and not repugnant, and a demurrer to the second count and a motion to elect between the counts were both properly overruled.

2. ———: ———: ———: ———: **Judgment: Cost.** The jury returned a verdict against defendant on the second count. *Held*, it was not entitled to a judgment on the first count, since the evidence of the common negligence alleged in the first count was proper as tending to show the agreement alleged in the second count and defendant would not be entitled to costs on either count.

3. **PRINCIPAL AND AGENT: General Agency: Private Restrictions.** When an agent is put forward as a general agent so that others are justified in the belief that his powers are general, restrictions privately imposed will be immaterial and can have no effect on the rights and remedies of third persons.

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4. ———: ———: **Evidence: Expert.** One who knows may testify as to the duties of a general claim agent of a railroad, and it is not necessary to qualify such witness as an expert.

5. ———: **Action: Instruction: Harmless Error: Burden of Proof.** An instruction relating to defendant's liability in the second count of its petition is approved, and the fact that it imposed more on the plaintiff than the law did is not reversible error; and it rightfully threw upon the defendant the burden of showing that the plaintiff had notice that the defendant's claim agent was without authority to make the contract.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins,* Judge.

AFFIRMED.

Martin L. Clardy and *Brown & Crowder* for appellant.

(1) The defendant contends that the court below erred in refusing to compel plaintiff to elect upon which count of the petition it would stand. Roberts v. Railroad, 43 Mo. App. 287; Rinard v. Railroad, 164 Mo. 270; Maguire v. Railroad, 103 Mo. App. 459. (2) Plaintiff has but one cause of action and is entitled to but one satisfaction. It may proceed on the theory of defendant's negligence, or on defendant's alleged agreement to reimburse plaintiff for one-half of the damages occasioned by the collision; but the two remedies cannot be pursued together. They are absolutely repugnant and inconsistent, hence the refusal to compel plaintiff to elect is reversible error. Bliss on Code Pleading, sec. 11. (3) The second count of the petition, charging mutual and concurrent negligence of both plaintiff and defendant, and also a subsequent agreement to reimburse plaintiff for one-half of the amount paid in settlement of damages occasioned by the collision in question, states two separate and distinct causes of action; and the jury having returned a verdict thereon for $3,394.90, it cannot be told which ground they based their verdict upon, therefore the

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judgment ought to be reversed. Crumply v. Railroad, 98 Mo. 34; King v. Railroad, 98 Mo. 235. (4) We contend that where, as in this case, the petition contained two counts stating two separate and distinct causes of action, and plaintiff has a verdict on the second count, but no verdict was rendered on the other, judgment should have been entered in favor of the defendant on the first count; and it was error not to enter such judgment accordingly. Buckman v. Railroad, 100 Mo. App. 35. (5) The great mass of evidence set out at length in appellant's abstract, representing the testimony of a dozen witnesses, some of whom were examined and cross-examined twice or more, was introduced mainly to prove the issues raised by the first count of the petition. The plaintiff, therefore, and not defendant should pay the costs due the officers for issuing and serving subpoenas for such witnesses, as well as the fees of the witnesses themselves, amounting to several hundred dollars; and the defendant was entitled to judgment to that effect. Edwards v. Railroad, 97 Mo. App. 111. (6) The court erred in permitting A. H. Rogers to testify touching the scope of defendant's general claim agent's duties. He was not qualified to express an opinion or to give expert testimony on that point. (7) The court erred in permitting testimony regarding the participation of defendant's assistant claim agent, Ewing, in settling a portion of the claims against the plaintiff company for damages growing out of the accident. This testimony was irrelevant, and was apt, not only to distract the jury and confuse their minds concerning the real issues, but to raise a prejudice which told against an impartial decision. (8) Plaintiff's sixth instruction should not have been given because it comments on the evidence and points out and dwells on certain matters connected with the settlement of the claims in controversy, to the exclusion of all others. (9) The third specification of plaintiff's sixth instruction is erroneous in that it authorized a

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recovery on the second count of the petition on the theory that the defendant's assistant claim agent, Ewing, participated in the settlement of these claims, and that in the settlement of such claims, plaintiff took releases from the claimants releasing both companies; thus singling out and giving undue and unfavorable prominence to certain specific facts, to the exclusion of all others. We do not understand this to be the law. State v. Hibler, 149 Mo. 478; State v. Rutherford, 152 Mo. 124; Chappell v. Allen, 38 Mo. 213.

McReynolds & Halliburton for respondent.

(1) Plaintiff's cause of action was the indebtedness of defendant to plaintiff for one-half of the amount paid by plaintiff for damages and costs growing out of the collision, under the written or verbal contract. It is stated in two counts: first, under the written contract; second, under the verbal contract. There is no improper joinder of causes of action. They are both upon contract and both transactions connected with the same subject of action. R. S. 1899, sec. 593. (2) Plaintiff is not seeking to recover in either count for a tort, but in both counts upon contract, one written and one verbal. They are not inconsistent, but are entirely consistent with each other; both may be true. If looked at as two causes of action, then they are separately stated. And if only one cause of action it is properly stated in two counts to meet any phase of the evidence. O'Neill v. Blase, 94 Mo. App. 655; Hess v. Gansz, 90 Mo. App. 443; Zellars v. Water & Light Co., 92 Mo. App. 114, and cases cited. (3) "While repugnant pleading is not permissible, to render a pleading bad, the repugnancy must be such that the proof of one state of facts pleaded as a basis for a recovery, will necessarily disprove another state of facts pleaded as such basis." Rinard v. Railroad, 164 Mo. 284. (4) There is no commingling of two causes of action in

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the second count. And even if there is, it is patent on its face and defendant waived it by answering over after its demurrer and motion to elect was overruled. R. S. 1899, sec. 602; Thompson v. School District, 71 Mo. 495; Shuler v. Railroad, 87 Mo. App. 622; Antonelli v. Basile, 93 Mo. App. 141; O'Neill v. Blase, 94 Mo. App. 656; Paddock v. Somes, 102 Mo. 235; Crenshaw v. Ullman, 113 Mo. 633; Reugger v. Lindenberger, 53 Mo. 364. (5) The court did not err in permitting A. H. Rogers to testify as to the duties of defendant's general claim agent. He testified that he knew the duties of the general claim agent and what they were, and was corroborated by Hoeffner and Ewing, defendant's witnesses, one chief clerk in general claim agent's office, and one assistant claim agent. The evidence as to the participation of Ewing in settling the claims for damages was proper and legitimate evidence. (6) Defendant having put Wm. E. Jones forward as its general claim agent, clothed him with the apparent power to make contracts of settlement on account of claims against defendant, it follows that if the defendant had imposed any limitations upon this apparent authority of its general claim agent, such limitations could not affect the plaintiff unless brought to its knowledge, and this was a question of fact to be submitted to the jury. Cross v. Railroad, 141 Mo. 132, 71 Mo. App. 575; Baker v. Railroad, 91 Mo. 160; Woolen Mills v. Meyers, 43 Mo. App. 124; Porter v. Woods, 138 Mo. 552; Sharp v. Knox, 48 Mo. App. 169. (7) Appellant's point numbered eight is leveled at instruction numbered six, given for respondent, and its counsel misreads same and misstates it and the effect of it.

JOHNSON, J.—Plaintiff and defendant in the year 1900 were each operating a line of railroad in Jasper county, the former using electricity, the latter steam, for motive power. Their tracks crossed at Webb City. On July 3, 1900, one of plaintiff's cars heavily

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loaded with passengers collided at the crossing with moving cars on one of defendant's tracks, resulting in the injury of a large number of passengers on plaintiff's car. Afterwards, plaintiff expended in the aggregate over seven thousand dollars in making settlements with the injured, and brought this suit to recover from defendant one-half of said amount. A trial resulted in a judgment for plaintiff and defendant appealed.

The first error assigned is the overruling by the trial court of a motion filed by defendant to require plaintiff to elect upon which of the two counts in its petition it would stand, and in overruling a demurrer to the second count. The real ground of the motion was the alleged repugnancy of the cause of action pleaded in one count to that pleaded in the other. The ground of the demurrer was the joinder in the second count of two causes of action, one *ex delicto,* the other *ex contractu.* After these pleas were disposed of defendant answered to the merits.

In the first count plaintiff alleged that at the time of the collision a written contract executed by the parties when the crossing was constructed was in force which, among other things, contained agreements relating to damages resulting from collisions at the crossing, in substance as follows: First, plaintiff was to employ at its expense a watchman whose duties were to guard the passage of trains and cars over the crossing, but each party was to bear one-half of any damage resulting from the negligence of such watchman; second, damages resulting from the sole negligence of one of the parties were to be paid by such party; third, damages caused by the concurring negligence of both parties to be divided equally between them. Facts were alleged showing the collision resulted from the negligence of the watchman and the concurring negligence of the servants of both parties; also, that plaintiff had at its own expense settled all resulting claims

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and made demand upon defendant for payment of one-half of the amount so expended.

The second count contained in substance all of the facts alleged in the first and, in addition, the averment that after the damage accrued the parties met, each recognized its liability and a verbal agreement was made whereby plaintiff was to proceed to settle the claims for damage, in consideration whereof defendant, at the conclusion of the settlement, should repay plaintiff one-half of the amount of its expenditure in that behalf made.

Defendant's position is that the cause of action pleaded in the first count is founded on tort; that in the second on contract. We do not entertain this view. Both arise *ex contractu* and are properly united in one petition. [R. S. 1899, sec. 593.] To sustain the cause declared upon in the first count it was proper, in fact necessary, to aver and prove the negligence of the watchman, or the concurrent negligence of the parties, in order to show the existence of facts essentially prerequisite to the mutual obligation created by the parties themselves under the stipulations of the written contract. Without these no such obligation existed between them, there being no right of contribution among joint tortfeasors. But the necessity to plead and prove these facts does not characterize the action as one *ex delicto*. The essence of the complaint is defendant's breach of contract in failing to pay as it agreed it would do in the situation disclosed by the facts alleged. The fact of negligence supported the consideration. Obviously, the purpose and intention of both parties in making these stipulations was to avoid a contest between them in cases of damage resulting from their joint negligence. In the absence of the right of contribution each naturally would endeavor with uncertain result to cast the entire burden upon the other. Nor is there any inconsistency between the two causes. Both seek recovery for the same indebtedness, one upon

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the written, the other upon the verbal contract. The two contracts are consistent and in effect co-operative. The second, made after the damage accrued, practically was in execution of the duties imposed by the first. Proof of one did not tend to disprove the other and defendant's negligence, prospective and existent, was a fact in part responsible for the origin of both.

"Repugnancy must be such that the proof of one state of facts pleaded as a basis for recovery will necessarily disprove another state of facts pleaded as such basis." [Rinard v. Railroad, 164 Mo. 284.] The motion to elect and the demurrer were both properly overruled.

Defendant insists the fact that the jury in its verdict found for plaintiff upon the second count alone is equivalent to a finding for defendant on the first. Undoubtedly, a separate cause of action with but one recovery is pleaded in each count. Both arise from and deal with the same subject-matter, but the constitutive facts of one are different in elemental particulars from those of the other. In the first, proof of the negligence of the watchman or of defendant's concurring negligence are indispensable to recovery. These are the facts upon which is predicated defendant's obligation to contribute; and failure to prove them defeats the action. In the second the fact of negligence is removed. The parties settled between themselves the question of their mutual liability under the former contract, thereby putting a quietus to any dissension between them as to whose negligence caused the damage. A new consideration was provided for by defendant's agreement to contribute: namely, that plaintiff should proceed to settle the claims, after which and in consideration whereof, defendant was required to contribute, regardless of the fact as to which one was negligent. Relying on this promise, plaintiff would have been justified in abandoning any course of action it

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may have adopted relative to establishing such negligence as would make defendant liable under the former contract, or relative to compromising or resisting the claims for damage. After making such agreement, and after plaintiff had acted upon it, defendant would not be permitted to interpose as a defense to an action brought against it by plaintiff to recover a moiety that it was in fact free from any negligence. The substantive facts essential to recovery under the second count were that the verbal agreement pleaded was made and that plaintiff carried out its terms; and with these established, plaintiff was entitled to recover even though it appeared from the evidence defendant was free from negligence.

We fail to see, however, any advantage to defendant in the refusal of the trial court to enter judgment in its favor on the first count, even with respect to its claim that a portion of the costs should have been taxed against plaintiff. Although the fact of defendant's negligence was not elemental to plaintiff's recovery under the second count, it does not follow that evidence thereof was not admissible. It tended to prove a substantive fact—the making of the verbal contract which was the principal subject of controversy thereunder. There is no ground for holding that the jury found in favor of defendant upon any issue involved in the case nor that prejudicial error was committed in failing to give judgment for defendant on the first count. [Roberts v. Railroad, 43 Mo. App. 287.]

Defendant further contends that the court erred in admitting evidence offered by plaintiff in proof of the making of the verbal agreement for the reason that it failed to show the agreement was made with anyone representing defendant having authority to make a contract of this character. Mr. Rogers, president of plaintiff company, testified that William E. Jones was the general claim agent of defendant, a Mr. Hoeffner was his chief assistant, and a Mr. Ewing was district

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claim agent. The claim agent's office was in St. Louis; the office of plaintiff in Joplin. Mr. Rogers was asked this question: "Do you know what the duties of the general claim agent's office of the Missouri Pacific are —what are their duties in connection with it?" To which he answered: "It is to settle all claims against the road; in case of an accident they are supposed to clear up the whole accident, if they consider themselves responsible for it: they have the authority." No objection was made either to the question or answer. It was claimed the agreement was made, first with Mr. Ewing, and afterwards ratified by Mr. Hoeffner, both of whom visited Joplin in defendant's interest; and that it was ratified by Mr. Jones. It is unnecessary to detail the testimony relative to the agreement, as there was abundant evidence tending to show the making of the agreement by the general claim agent and that it was acted upon by both parties. Defendant's witnesses admit that Jones was the general claim agent and that Hoeffner and Ewing were his assistants, but claim the scope of his authority was limited to exclude the adjustment of differences arising under contracts similar to the written contract in this case. There is no claim that plaintiff had notice or knowledge of any such limitation to the authority of the general claim agent. This question falls squarely within the rule stated in Baker v. Railroad, 91 Mo. 152: "When the principal puts the agent forward as a general agent or places him in a position where others are justified in the belief that his powers are general, the restrictions that may be imposed privately on the agent will be immaterial except as between him and the principal, and can have no effect on the rights or remedies of third persons who have no knowledge of the restrictions or limitations upon his apparent authority." [New Albany Woolen Mills v. Meyers, 43 Mo. App. 124; Sharp v. Knox, 48 Mo. App. 169; Porter v. Woods, 138 Mo. 551.]

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It is urged that the testimony of Mr. Rogers relative to the duties of the general claim agent was a mere conclusion and not the statement of a fact. We think the scope of the duties of this officer was a fact which a witness possessing knowledge thereof could state. We do not agree with defendant that the scope of the duties of an agent is a matter of expert knowledge requiring the qualification of the witness before he is permitted to testify, nor is there anything in the evidence to show Mr. Rogers was without means of knowledge. He testified as "one who knew whereof he spoke." He was not examined as to the source of his information. For aught the evidence discloses, his knowledge of the subject may have been as authentic, accurate and comprehensive as that of the claim agent himself. Plaintiff was entitled to have his evidence considered; the weight to be given it was a question for the jury. If accepted, this evidence was proof of the authority of the general claim agent to make the contract in question.

Plaintiff's sixth instruction is as follows: "The court instructs the jury that if they believe from the evidence that one William E. Jones was general claim agent of defendant company, and as such had general authority to adjust and settle claims against defendant for damage by reason of accidents and injuries in the operation of its trains, then plaintiff had a right to rely on his authority to arrange with plaintiff to adjust and settle all claims for damages to persons by reason of the collision, testified to by the witnesses, and if they further believe from the evidence that general agent Jones, through his subagents, agreed with plaintiff that if plaintiff would go ahead and adjust and settle with parties claiming damage on account of said collision, and take releases to both plaintiff and defendant, that defendant would repay to plaintiff one-half of the amount so necessarily paid out in settling and adjusting with parties so claiming damages, and

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that plaintiff's employees, aided by defendant's employees, did adjust with and pay all of the parties claiming damages on account of such collision, and that plaintiff did take releases from such parties, *releasing both plaintiff and defendant,* then the jury should find for the plaintiff on the second count of the petition unless the jury should further believe from the evidence that defendant's general claim agent had no authority to make such agreement, and that plaintiff's officers, Rogers or Maret, knew or had notice that defendant's general claim agent had no such authority, and the burden is on defendant to show that they or one of them knew or had notice that said Jones had no such authority."

Several attacks are made upon this instruction. Most of them have been answered in the views expressed and will not be further commented upon.

It appeared in the evidence that Ewing, as assistant to the general claim agent, gave personal aid to plaintiff in adjusting some of the damage claims. It is contended that in referring to this fact in the instruction, error was committed. The language complained of is, "and that plaintiff's employees *aided by defendant's employees* did adjust with," etc. We do not regard the incorporation of this fact in the instruction as an element of plaintiff's right to recover, a comment upon the evidence or the singling out of a particular fact. It was not a fact essential to the right, but if plaintiff chose to make it such it was the only party that could have been injured thereby. It assumed a heavier burden than the law imposed. This was not reversible error. [State v. Hibler, 149 Mo. 484; R. S. 1899, sec. 865.] The burden of showing the restrictions, if any, upon the authority of the general agent was properly placed upon the defendant. [Baker v. Railroad, supra.]

The judgment is affirmed. All concur.

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J. C. BREEDEN, Appellant, v. THE FRANKFORD MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY, Respondent.

Kansas City Court of Appeals, February 27, 1905.

1. **MAINTENANCE: Champerty: Action.** Maintenance is an old action at common law, the right of which still exists and consists in the officious intermeddling in a suit that in no way belongs to one, by assisting either party with money, or otherwise in his action; it differs from champerty in that it is voluntary while the champertor has in view a share of the spoils of the litigation.

2. ———: **Pleading.** A petition alleging that the defendant intermeddled in a suit plaintiff was having against a mining company for personal injuries and thereby the litigation was delayed until the mining company became insolvent and the plaintiff was compelled to accept one thousand dollars in payment of a three thousand five hundred dollar judgment, states a cause of action.

3. ———: **Defense: Personal Injury: Insurance.** Where a mining company has taken insurance against the personal injury of its employees, the insurer may interfere and assist the mining company in a suit brought against it for a personal injury by one of its employees, and such interference is not maintenance; nor would the interference in the defense of a suit by persons sustaining many other relations to the defendant, such as parent in aiding a child or one in assisting a poor friend, constitute maintenance.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins*, Judge.

Reversed and remanded.

Shannon & Shannon for appellant.

The court erred in sustaining defendant's demurrer to plaintiff's amended petition. 5 Am. and Eng. Ency. of Law (2 Ed.), 815; 5 Am. and Eng. Ency.

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of Law (2 Ed.), 821; Duke v. Harper, 66 Mo. 51; Vulcanide Co. v. White, 10 Fed. 752; Fletcher v. Ellis, Fed. Cas. No. 4863a; Harris v. Brisco, 17 Q. B. Div. 504; Pechell v. Watson, 8 M. & W. 691.

W. R. Robertson for respondent.

(1) It was the duty of plaintiff to do every act possible on his part to decrease any damages to him by reason of any unlawful act of defendant, either imaginary or otherwise. Douglas v. Stephens, 18 Mo. 362; Trust Co. v. Stewart, 115 Mo. 236; State ex rel. v. Harrington, 44 Mo. App. 297. (2) The allegations that "defendant unlawfully, willfully and maliciously maintained the Big Circle Mining Company" are but mere conclusions of law and consequently surplusage. Bliss on Code Pleading (3 Ed.), sec. 211; Nichols v. Stevens, 123 Mo. 117. (3) If defendant committed no legal wrong, though, as plaintiff alleges, its acts resulted in damage to plaintiff, and though defendant may have had improper motives, the law affords no remedy. Land & Gravel Co. v. Com. Co., 138 Mo. 445. (4) The policy of the law which strikes at champerty and maintenance only prohibits the enforcement of contracts based thereon and does not act on the subject of such contract so that it destroys the claim of plaintiff or the defense of the defendant. It is the unlawful dealing in the right, and not the right itself, on which the barrier is placed. Euneau v. Rieger, 105 Mo. 682; Pike v. Martindale, 91 Mo. 284; Bent v. Priest, 86 Mo. 490. (5) A suit for personal injuries being for an unliquidated or uncertain claim and amount, there could be no contract tainted with champerty or maintenance relative thereto, as the two essential elements are not present; that is to say there must be, first, an undertaking to defray the expenses of the litigation; and, second, an agreement or promise on the part of the party to divide with the litigant the proceeds of

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the suit in the event it proves successful. Torrence v. Shedd, 112 Ill. 466.

ELLISON, J.—Plaintiff was engaged in mining, as a laborer, for a corporation known as the "Big Circle Mining Company" and was injured (as he alleged) by reason of the negligence of that company. He brought suit against the company for damages and obtained a judgment for $2,500. The mining company appealed to this court where the judgment was reversed and the cause remanded for a new trial. At the second trial this plaintiff again prevailed and obtained a judgment against the mining company, this time for $3,500. Of the latter judgment plaintiff accepted $1,000 as in full and satisfied the record.

Thereafter he instituted this action of maintenance against the present defendant for damages on account of this defendant having willfully intermeddled and unlawfully maintained the defense of the mining company in his case for personal injury. The defendant demurred to the petition as not stating a cause of action. The demurrer was sustained and plaintiff, in view of that ruling, having refused to amend, judgment was rendered for defendant and plaintiff appealed.

Maintenance is one of the old actions at common law, the right of which exists to this day. [Bradlaugh v. Newdegate, 11 Queen's Bench Div. 1.] It is defined as an "officious intermeddling in a suit that no way belongs to one, by assisting either party with money, or otherwise, to prosecute or defend." And it is said, "to be an offense against good morals, in that it keeps alive strife and perverts the remedial powers of the law into an engine of oppression." [5 Am. and Eng. Ency. of Law (2 Ed.), 815.] The offense may be committed by stepping in after litigation has been begun, as by encouraging and aiding its origin. [Bradlaugh v. Newdegate, supra, 9.] Champerty is

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generally treated by text-writers in connection with maintenance and it, also, is one of the old common law actions which yet subsists. [Duke v. Harper, 66 Mo. 51.] These old actions, though akin, are unlike in many particulars. The champertor has in view a profit to himself in a share of the spoils of the litigation. The maintainer is more of a voluntary intermeddler and stirrer up of strife for the love of it. He is described as an *officious* intermeddler. In other words, he interferes where he has no business.

The action being recognized to exist as a common law action, we have examined the petition with a view to ascertaining the legal merits of the demurrer. We find that it sets out the controversy which existed in litigation between this plaintiff and the mining company. That he obtained judgment against said company. That this defendant "unlawfully, willfully and maliciously, without having any interest in the case, maintained the mining company by obtaining and prosecuting an appeal from the judgment," etc. (describing how it did so). Continuing, it alleged that all expenses of procuring and perfecting said appeal were paid by the defendant herein. The petition then alleges the reversal of the judgment and remanding of the cause for another trial. That at such second trial this defendant continued to maintain the defense at its own expense. That by various ways it caused the case to be continued and changes of venue to be had; but that finally, at the second trial, plaintiff obtained judgment against the mining company for $3,500. It then alleges that before the second trial the mining company had become insolvent, so that it became impossible for plaintiff to collect his judgment and that in view of such condition of the mining company he was compelled to accept $1,000 in full of his said judgment. That at the rendition of the first judgment the mining company was solvent and its insolvency came about between the first and second judgment. And that

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but for defendant's unlawful interference he would have collected the first judgment. And that but for defendant's continued unlawful interference and delay before the second trial he would have secured his second judgment in time to have collected it before the mining company became insolvent.

In our opinion the petition stated a cause of action. If the acts charged are true (and we must so consider them) defendant was guilty of maintenance and should respond in damages.

Though it does not appear of record, yet in view of the statement of counsel, it may turn out that defendant in its interference with plaintiff's case against the mining company was not an officious intermeddler. It is said that this defendant is an accident insurance company, and that in that capacity it had indemnified the mining company, upon a valuable consideration, to hold such company harmless from liability in personal injury cases arising against it in favor of employees. Now, if that be true, defendant is not guilty of maintenance in taking part in the litigation between plaintiff and the mining company, and in using the same endeavor and the same means in aid of the mining company to defeat the case which that company might legally have used without such aid. The law recognizes that where one has an interest in the result of a controversy he may aid in its litigation without subjecting himself to prosecution for maintenance, civilly or criminally. Thus he may be a surety or guarantor on a note and aid the principal in defense. He may be a warrantor of title to property and aid and sustain a defense by the warrantee. The landlord may aid his tenant, etc. [5 Am. & Eng. Ency. Law (2 Ed.), 821.]

But more than that, there need not be a pecuniary interest in the result to absolve the aider from the charge of maintenance. The parent may aid the child, or the child the parent; and so in other substantial

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degrees of relationship. And yet more than that, the law extends its charity to the charitable and compassionate and will not pronounce it maintenance for one to aid his poor friend and thus assist in protecting him from what he deems an oppression or a wrong. [Harris v. Brisco, 17 Queen's Bench Div. 510. Gilman v. Jones, 87 Ala. 691.]

It, therefore, seems clear to us that if this defendant had the interest in the result of plaintiff's suit against the mining company which has been suggested, it had a right to take part in and aid that company in the defense.

The judgment is reversed and cause remanded.

All concur.

DALE & BENNETT, Appellants, v. GOLDENROD MINING COMPANY, Respondents.

Kansas City Court of Appeals, March 6, 1905.

1. **PARTNERSHIP: Sharing Profits: Agreement: Instruction.** An instruction relating to the existence of a partnership between the parties named, if they were to share in the profit and loss according to their respective interests, without regard to an express agreement to become partners and so share the profits and loss, is held proper.

2. ——: ——: ——: **Third Parties.** An agreement failing to make defendants partners does not prevent them becoming partners as to third parties.

3. **TRIAL PRACTICE: New Trial: Presumption.** Though a trial court err in granting a new trial for the reason it states, its order must be upheld unless there are one or more other causes which would justify a new trial, and it is incumbent upon respondent to show such other causes, otherwise the action of the trial court is presumptively correct.

Appeal from Jasper Circuit Court.—*Hon. Hugh Dabbs,* Judge.

REVERSED AND REMANDED (*with directions*).

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H. S. Miller for appellants.

The court erred in sustaining defendants' motion for a new trial. Lumber Co. v. Christophel, 59 Mo. App. 80; Schmidt v. Railway Co., 163 Mo. 645; Herdler v. Stove and Range Co., 136 Mo. 3; Candee v. Railroad, 130 Mo. 154; Lowell v. Davis, 52 Mo. App. 342; Vatine v. Rex, 93 Mo. App. 93; Thompson v. Railroad, 140 Mo. 125; Haven v. Missouri Co., 155 Mo. 226; Campbell v. Railroad, 86 Mo. App. 67; Ittner v. Hughes, 133 Mo. 679; Miller v. Car Co., 130 Mo. 517; Armiston v. Trumbo, 77 Mo. App. 314; Bradley v. Reppell, 133 Mo. 545; Baughman v. Fulton, 139 Mo. 559; Real Estate Co. v. McDonald, 140 Mo. 612; Snyder v. Burnham, 77 Mo. 52; Kansas City v. Oil Co., 140 Mo. 475; State v. Reed, 89 Mo. 168; Walker v. Railroad, 83 Mo. 609; Gains v. Fender, 82 Mo. 497.

Thomas Dolan for respondents.

(1) The relations of the parties were defined in the contract above set out under which the ground was being mined by Adam Scott. There is no evidence in the record anywhere that that contract was abandoned, it appears from the testimony of Mr. Stevens, the superintendent of the Granby Mining Co., and Dolan, the attorney for respondents as well as respondents, that Scott continued mining under said contract during the times referred to by plaintiffs and up to the time the mine was shut down and possession taken of it by respondents. (2) The giving of instruction numbered four was clearly erroneous because it tells the jury that a partnership existed, although there was no express agreement to become partners if they conducted mining operations jointly. (3) Appellant relies on the case of Snyder v. Burnham, 77 Mo. 52. That case is not applicable. The mere sharing of

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profits and losses has been held not to constitute a partnership, if it can be shown that no partnership was intended. This can be shown by the contract set out. It is very clear that this contract does not constitute Scott and Brintlinger and Hodge partners. Hughes v. Ewing, 162 Mo. 261; Hardware Co. v. Harrison, 89 Mo. App. 154; Hazel v. Clark, 89 Mo. App. 78; Mackie v. Mott, 146 Mo. 230.

ELLISON, J.—This case like that of Tamblyn v. Scott, —Mo. App.—, was commenced to recover of defendant Scott and defendants Brintlinger and Hodge the amount of an account, the purchases making up such account being made by Scott. The same contract involved in the Tamblyn case was also in evidence in this case. But, unlike the Tamblyn case, the plaintiff here obtained a verdict. This the court set aside and granted a new trial on account of supposed error in giving for plaintiff the following instruction.

"The court instructs the jury that if you believe from the evidence that defendants were jointly engaged in extracting ore or mineral from the ground on the lots mentioned in the written contract introduced in evidence, and each defendant was to share in the profit and loss, according to their respective interests therein, then the partnership relations subsist among them, although there is no express agreement to become partners or to share in the profits and losses."

The instruction finds direct support in Snyder v. Burnham, 77 Mo. 52, involving, as does this case, a question of mining partnership. We regard the evidence in the cause as justifying the court in giving the instruction and it was error to grant the new trial on account thereof.

But it is argued by defendants that Snyder v. Burnham is not applicable here since in this case there is an express written agreement as to the relation of

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the partners and that such agreement does not, of itself, make them partners. But be that as it may, there is nothing in the written agreement to prevent them becoming partners, especially as to third parties. The whole evidence in the case justified the instruction and it was properly given.

The rule is that though the trial court errs in granting a new trial for the reason stated by such court, yet, if one or more other causes be set out which justify a new trial, the order granting it will be upheld on appeal. But it will be presumed that the trial court disregarded the other causes assigned and that in so doing it was right, unless the other party shows some of the other causes to be sound, and thus justifies the new trial. [Millar v. Madison Car Co., 130 Mo. 517; Haven v. Railway, 155 Mo. 216.]

In the case in hand we find no cause justifying a new trial and the order therefor will be reversed and cause remanded with directions to enter judgment on the verdict. All concur.

DAVID D. OWENS, Respondent, v. CARTHAGE & WESTERN RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, March 6, 1905.

1. **DEEDS: Reformation: Railroad Crossing: Wagon Pass.** Evidence in a suit to reform a deed and correct a mutual mistake is considered and held sufficient to show that the expression "cattle or wagon pass" used in the deed was intended to mean not a crossing but an underway twelve feet wide and ten feet high.
2. **EQUITY: Reformation: Specific Performance: Building Contract: Railroad Crossing.** Cases relating to refusing to grant specific performance in ordinary cases of building contracts are distinguished, since this is action to enforce specific performance of a contract whereby defendant agreed to do certain work for the benefit of plaintiff on its own premises, and which could not be done by another.

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3. **EVIDENCE: Reformation: Similar Contracts.** In an action to reform a contract in a deed evidence that defendant company accepted similar deeds and executed the contract therein in the manner sought by the plaintiff, is admissible.

4. **EQUITY: Reformation: Specific Performance: Damages: Misjoinder: Trial and Appellate Practice.** Objection to the improper misjoinder in the same count of actions to reform a deed and enforce specific performance of a contract therein contained, and for damages for nonperformance must be made in the trial court and cannot be considered for the first time in the appellate court.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins,* Judge.

AFFIRMED.

Martin L. Clardy, E. O. Brown and *Geo. W. Crowder* for appellant.

(1) The finding and decree is not warranted by the pleadings, and is not supported by the facts shown in evidence. In other words, the court below was not authorized, under the pleadings and evidence, and it was error to reform the deed in question by inserting such a provision therein. Jewett v. Railway, 45 Mo. App. 58; Blain v. Knapp, 140 Mo. 251; Mastin v. Halley, 61 Mo. 196; Bank v. Farris, 77 Mo. App. 186; 2 Am. and Eng. Ency Law (2 Ed.), 304; Webster v. Paul, 10 O. St. 532; Crim v. Crim, 162 Mo. 553; Johnson v. Ins. Co., 93 Mo. App. 580; Miers v. Somerville, 85 Mo. App. 50; Parker v. Vanhoozer, 142 Mo. 621; Newman v. Bank, 70 Mo. App. 141; Kingman v. Schulenberger, 64 Mo. App. 557; Holliday v. Leasch, 85 Mo. App. 285; Squire v. Evans, 127 Mo. 518; Yeoman v. Hoshaw, 98 Mo. 360; Morgan v. Porter, 103 Mo. 135; Pearson v. Carson, 69 Mo. 550; Loan Co. v. Workman, 71 Mo. App. 275; Tuggles v. Collison, 143 Mo. 527; 20 Am. and Eng. Ency Law (2 Ed.), 809, 810, 832. For the same reason a court of equity will not reform an instru-

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ment merely because the parties may have been mistaken as to the legal interpretation and effect of such instrument. So if a person executes a deed without reservation he cannot afterwards have it set aside on the ground that he did not know the effect of the deed without this provision. 20 Am. and Eng. Ency. Law (2 Ed.), 810. (2) Moreover, to entitle plaintiff to a reformation of the deed on the ground of mistake the mistake must have been mutual and not merely a mistake on the part of the plantiff alone. Henderson v. Ins. Co., 49 Mo. App. 255. Besides, the evidence of mistake must be clear and convincing. Bartlett v. Brown, 121 Mo. 353. (3) Our contention is that the deed embodied the entire agreement of the parties touching the cattle pass or crossing in question, and the trial court clearly misconceived the law of the case and tried it throughout upon an erroneous theory in permitting plaintiff to introduce oral testimony varying the terms of the deed in reference to the crossing. The deed embraced the entire contract and in the absence of fraud parol evidence was not permissible to enlarge its terms. There is no ambiguity in the deed and, therefore, it was not the subject of oral explanation. Newman v. Bank, 70 Mo. App. 141; Kingman v. Schulenberger, 64 Mo. App. 557; Holliday & Co. v. Leasch, 85 Mo. App. 285; Squire v. Evans, 121 Mo. 518; Loan Co. v. Workman 71 Mo. App. 275; Morgan v. Porter, 103 Mo. 131; Tuggles v. Collison, 143 Mo. 527; Johnson v. Ins. Co., 93 Mo. App. 580; Mfg. Co. v. Hunter, 87 Mo. App. 50; Miers v. Somerville, 85 Mo. App. 183; Parker v. Vanhoozer, 142 Mo. 621; Crim v. Crim, 162 Mo. 554. (4) The action of the court in permitting plaintiff, over defendant's objection, to show that the defendant company had constructed undergrade crossings on the farms of Mevey, Clark and Weaver under deeds containing similar clauses with respect to crossings, in no wise enlarged plaintiff's rights, nor created any liability upon the de-

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fendant so far as the crossing in controversy is concerned. (5) An action will not lie for the specific performance of the deed in question where, as in this case, the consideration named is that the defendant company "agrees to construct a cattle or wagon pass at the place designated by the chief engineer on said premises," without any further description. Mastin v. Halley, 61 Mo. 196. The case at bar falls squarely within the line of cases where specific performance is denied. (6) The duties to be performed by the defendant in constructing and maintaining a passway for stock under its track are not only continuous, but would require judicial supervision as long as the right of way over plaintiff's land was used for railway purposes. Under such circumstances it is universally held that a court of equity will not decree specific performance for the reason that the court cannot turn itself into a mere supervisor of construction. 2 Story's Eq. Juris. (10 Ed.), sec. 726; Railroad v. Railroad, 13 Ohio St. 544; 3 Pomeroy's Eq. Juris., note to sec. 1405. Collins v. Plum, 16 Ves. 454; London v. Nash, 3 Atk. 512; Caswell v. Gibbs, 33 Mich. 331; Blanchard v. Railroad, 31 Mich. 43; Marble Co. v. Ripley, 10 Wall. 339; Strang v. Railroad, 93 Fed. Rep. 71; Railroad Co. v. Wythes, 5 Deg. McN. & Gord. 880; Railway v. Stone Co., 39 N. E. 703; McCarter v. Armstrong, 8 L. R. A. 625. (7) It was error to mingle a cause of action in the same count to reform a deed and specifically enforce the same as reformed with one for damages for failure to perform the contract and to proceed to try them together before the chancellor. Henderson v. Dickey, 50 Mo. 161; Kabrich v. Ins. Co., 48 Mo. App. 398; Peyton v. Rose, 41 Mo. 257; Meyers v. Field, 37 Mo. 434.

Shannon & Shannon for respondents.

(1) The cases of Jewett v. Railway Co., 45 Mo. App. 58, and Mastin v. Halley, 140 Mo. 251, cited by

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counsel for appellant following their first paragraph under the heading of points and authorities, are the only cases in the long list of authorities cited in the same connection, which seem to be in any sense parallel with the case at bar. (2) The Jewett case, supra, is in a measure parallel to the case at bar, but in that case it was admitted that, at the time of the execution of the contract involved in the suit, the railway agent disclamed any authority to contract for an "under crossing." In the case at bar it does not appear whether Purcell was authorized or not to obligate appellant to construct an undergrade crossing for respondent, but in other cases where he had assumed such authority, the railway company had ratified his contracts by constructing undergrade crossings. But the fact is that in this case he assumed such authority, and contracted with respondent to construct such a crossing. Even if he had no authority to do so, appellant cannot now avail itself of such want of authority, having failed to tender back to respondent the right of way in question. This proposition is certainly so elementary as to require no citation of authorities. (3) The Mastin case, supra, is cited on two theories; First, that specific performance of a building contract will not be enforced. Second, that the cattle or wagon pass, as described in the deed, *even after reformation*, though in their discussion counsel seem to ignore the terms of the deed as reformed, is not so described as to enable a court to direct its construction. The reason assigned in the Mastin case for the rule that a building contract will not be specially enforced is that, "If one will not build, another may." But in this case if the appellant will not construct the wagon or cattle pass, who could? (4) In the case at bar there was a definite agreement between the parties for a cattle or wagon pass twelve feet wide and not less than ten feet high, preceding the execution of the right of way deed, and in reducing the agreement to writing an "error

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of expression" was committed, both parties believing that the language used was commonly understood by railway builders to mean all that had been specified in the previous negotiations. Therefore, equity will administer relief by reforming the contract. 20 Am. and Eng. Enc. Law (2 Ed.), 821; 24 Am. and Eng. Enc. Law (2 Ed.), 648; Henderson v. Beasley, 137 Mo. 199; Ezell v. Peyton, 134 Mo. 484; Buggy Co. v. Woodson, 59 Mo. App. 550. (5) There was no error in admitting in evidence the deeds of Mevey, Clark and Weaver, and their testimony concerning their transactions with Purcell. Collateral facts for the purpose of proving intent or motive are received in evidence in both civil and criminal cases. State v. Williamson, 106 Mo. 162; State v. Williams, 136 Mo. 293; State v. Balch, 136 Mo. 103; Gunn v. Thurston, 130 Mo. 339. (6) Appellant's objection that there were two causes of action improperly joined comes too late. As the objection that two causes of action were united in the same count was not taken in the court below it will not be considered. Callaghan v. McMahan, 33 Mo. 111; Mead v. Brown, 65 Mo. 552; Jamison v. Copher, 35 Mo. 483; Sweet v. Maupin, 65 Mo. l. c. 72; Anderson v. McPike, 41 Mo. App. 328.

ELLISON, J.—The plaintiff is the owner of land over which defendant constructed its railway. Plaintiff conveyed the right of way to defendant by deed, the consideration expressed being $400 in money and the following clause: "Said Carthage & Western Railway Company hereby agrees to construct cattle or wagon pass at place designated by the chief engineer on said premises." Plaintiff alleges that he and defendant understood that the contract and agreement was that defendant would construct a crossing *under* the tracks of sufficient width and height to admit of the passage of cattle and loaded wagons; that is to say, not less than twelve feet wide and ten feet high,

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at a point to be designated by the defendant's chief engineer. He further alleges that he and defendant by mutual mistake supposed the words in the deed above quoted meant what they each understood.

Defendant having refused to comply with the agreement alleged, plaintiff brought this action to reform that portion of the deed referred to so as to correct the mistake of the parties and to set out the contract as it was understood, and to require defendant to perform it. The trial court found the issues for the plaintiff and directed that a passway be constructed under the railroad, sufficient for cattle and loaded wagons, which was found to be twelve feet wide and ten feet high.

The contract in the deed as to the cattle and wagon pass is ambiguous in that it is not clear whether the pass was to be overhead, on the surface, or underneath the railway track. The circumstances and conditions surrounding the parties show definitely enough that an overhead crossing was not contemplated; but such conditions and circumstances do not demonstrate whether a surface or under passway was intended. The proof preserved in the record is ample that the parties understood that the word "pass" signified under the track, as distinguished from "crossing" over the surface. And it is likewise ample that the contract expressly provided for a pass under the railway for cattle and wagons of twelve feet in width and ten feet in height. And so it appears clearly enough that the parties understood the deed to so express the contract. The deed reads that, a "cattle or wagon pass" is to be constructed. This would mean a pass sufficient for cattle and farm wagons whether loaded or unloaded. Now, it is common knowledge that some farm productions which are taken by wagon through a farm, or from one field to another, will need a space of twelve feet in width and ten feet in height to pass through. So, therefore, we may well believe the plain-

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tiff's theory that, after so agreeing, the parties assumed that the expression in the deed, "wagon pass," meant one of at least the size just stated.

It being clear that the mistake in the deed was mutual, it was proper to reform it, so that it might express the contract between the parties. [Henderson v. Beasley, 137 Mo. 199; Ezell v. Peyton, 134 Mo. 484; 20 Am. and Eng. Ency. of Law, 821; 24 Ib. 648 (2 Ed.).]

We are cited to several cases as authority against the decree. We do not think they are applicable to the case made by plaintiff. In Jewett v. Railroad, 45 Mo. App. 58, it was shown and practically admitted that the agent did not have authority to make the contract sought to be enforced. In Mastin v. Halley, 61 Mo. 196, it was held that specific performance of a contract to build "a certain building" without more description could not be decreed, as there was nothing upon which to base a direction as to what description of building was to be built. It was likewise said in that case that a court of equity will not direct specific performance of building contracts, because: "if one will not build another may." That case finds no application to the facts of the one at bar. From what we have already said, it is apparent that there was sufficiency of description here to justify the court's decree in that respect.

As to the objection that courts of equity will not enter upon the enforcement of building contracts: it is manifest that this is not such case. When the complaining party wants a building contract performed it is something which he may get any third party to do without the aid of a court of equity. But the contract in this case is something which defendant was to perform for plaintiff's benefit on its own premises (so to speak) and which this plaintiff, in the nature of the case, could not have anyone, other than defendant, perform.

It seems that defendant embodied in the deeds

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similar agreements with other landowners from whom it secured right of way. Plaintiff was permitted to show, against defendant's objection, that under such deeds defendant had constructed under passways of the nature he is now demanding. We regard the evidence as admissible as tending to show what the contract with plaintiff was understood by the defendant to be.

The final point for reversal is that there was an improper joinder of causes of action, in that a reformation of the deed and specific performance and damages for nonperformance are joined in one count in the petition. Such objection comes too late when made for the first time in this court, and we need not pass upon it. It should have been raised by demurrer or answer. [Mead v. Brown, 65 Mo. 552; Sweet v. Maupin, 65 Mo. 72; Jamison v. Copher, 35 Mo. 483; Anderson v. McPike, 41 Mo. App. 328.]

After a full consideration of the points made against the judgment we do not feel authorized to interfere with it and it is accordingly affirmed. All concur.

IDA HERZBERG, Appellant, v. MODERN BROTHERHOOD OF AMERICA, Respondent.

Kansas City Court of Appeals, March 6, 1905.

1. **BENEFIT SOCIETIES: Conflict of Laws: Iowa and Missouri Statutes.** Where in construing the policy of a benefit society organized under the laws of Iowa it is found that the laws of that State and this State are different, the Missouri statute controls.

2. ———: ———: ———: **Legal Representatives.** A certificate of a benefit society determines whether it operates under the assessment statute or under the general insurance law, and where it is made payable to the legal representatve it is

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without the protection of the assessment statute since such payment would send the money to the general estate and so frequently entirely divert it from those the Missouri statute directs shall be the beneficiaries.

3. ——: ——: ——: ——. Nor can the fact that the society calls itself fraternal or that the Secretary of State issued a statutory permission to do business as such, affect the matter.

4. LIFE INSURANCE: Misrepresentations: Defense: Deposit. In order that a misrepresentation of the assured shall forfeit a life policy it must be averred and shown that the subject-matter of the misrepresentation caused the death and the insurer must deposit in court the premiums paid by the assured.

Appeal from Jackson Circuit Court.—*Hon. James Gibson,* Judge.

REVERSED AND REMANDED.

Lawrence & Lawrence for appellant.

(1) Respondent is not a fraternal beneficiary association as defined by Missouri laws. R. S. 1899, secs. 1408-1410; State ex rel. v. O'Rear, 144 Mo. 157; Baltzell v. Modern Woodmen, 98 Mo. App. 153; Bacon, Ben. Societies, sec. 399; Barsfield v. M. W. of A., 88 Mo. App. 208; Barsfield v. Maccabees, 92 Mo. App. 102; McDonald v. Ins. Co., 154 Mo. 618; Aloe v. Ins. Co., 164 Mo. 675; Logan v. Casualty Co., 146 Mo. 114. (2) Suicide as pleaded is not a defense. R. S. 1899, sec. 7896. (3) Misrepresentations as pleaded are no defense and error to admit testimony tending to prove same. R. S. 1899, secs. 7890, 7891 and 7936; Christian v. Ins. Co., 143 Mo. 460; Scheuerman v. Ins. Co., 165 Mo. 651; Thassler v. Ins. Co., 67 Mo. App. 505; Lavin v. Ins. Co., 101 Mo. App. 434; Aloe v. Ins. Co., 164 Mo. 675. (4) By demanding and receiving about December 20, 1900, and retaining the assessment on the contract of insurance, respondent recognized the validity of the policy and waived its rights to the affirmative defenses of suicide and misrepresentations. Matt v. Prot. Soc.,

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70 Iowa 461; Bradford v. Ins. Co., 112 Iowa 500; Bacon, Ben. Societies, secs. 431, 434, 435; Erdman v. Ins. Co., 44 Wis. 376; Burdick v. Life Assn., 77 Mo. App. 637; s. c., 86 Mo. App. 94, 91 Mo. App. 529; Hopkins v. M. W. of A., 94 Mo. App. 402. (5) Appellant's refused instructions should have been given by the court, and those given at the request of respondent should have been refused. A new trial should have been granted. Authorities supra. R. S. 1899, sec. 899; Brown v. Ins. Co., 74 Mo. App. 490; Remmler v. Shermit, 15 Mo. App. 192; McGinnis v. Railroad, 21 Mo. App. 391; Proctor v. Loomis, 35 Mo. App. 482; Com. Co. v. Hunter, 91 Mo. App. 337.

Kinley & Kinley for respondent.

(1) The appeal in this case should be dismissed because appellant has not prepared, served and filed an abstract of the record as required by rule 15 of this court. Costello v. Fisher, 80 Mo. App. 107; Brand v. Connor, 118 Mo. 595; Epstein v. Clothing Co., 67 Mo. App. 221. (2) Fraternal beneficiary associations, foreign and domestic, are placed on same footing, and are expressly exempted from the operation of the general insurance laws. Hudnall v. M. W. of A., 103 Mo. App. 356; Shotliff v. M. W. of A., 100 Mo. App. 138; McDermott v. M. W. of A., 97 Mo. App. 636; Brasfield v. K. of M., 92 Mo. App. 102; Brasfield v. M. W. of A., 88 Mo. App. 208; Morton v. Royal Tribe, 93 Mo. App. 78; Chapter 12, art 2, secs. 1408, 1409, 1410, 1411. (3) Suicide is a defense under a fraternal beneficiary association certificate. Brasfield v. M. W. of A., 88 Mo. App. 208; McDermott v. M. W. of A., 97 Mo. App. 636; Shotwell v. M. W. of A., 100 Mo. App. 138; Hudnall v. M. W. of A., 103 Mo. App. 356. (4) Misrepresentation and false answers to questions in a written applica-for membership and a benefit certificate in a fraternal beneficiary association avoids the certificate. McDer-

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mott v. M. W. of A., 97 Mo. App. 636; Whitmore v. Ins. Co., 100 Mo. 36; Handford v. Ben. Assn., 122 Mo. 50. (5) The plaintiff was not entitled to recover and the court should have given respondent's instruction to that effect. The verdict of the jury was for the right party and in harmony with the true law. The verdict therefore should not be disturbed, no matter whether the court misdirected the jury or not. Hill v. Wilkins, 4 Mo. 88; Orth v. Dorschlein, 32 Mo. 366; Kelly v. Railroad, 88 Mo. 534; Ellerbe v. Bank, 109 Mo. 445; Harmuth v. Railroad, 129 Mo. 642; Havens v. Railroad, 155 Mo. 224; Moore v. Railroad, 176 Mo. 88.

ELLISON, J.—This action is to recover the amount alleged to be due on a benefit certificate issued to plaintiff's deceased husband. The trial court gave several instructions for either party. The judgment was for defendant and plaintiff appeals.

The real contest between the parties to this controversy is whether the defendant can properly claim to be an insurance company known to the laws of this State at this time as a fraternal beneficiary association. If it belongs to that class, it is exempt from some stringent provisions of our statute governing general life insurance. The statute as to general life insurance companies does not allow the defense of suicide unless the policy be taken out with that view. [R. S. 1899, sec. 7896.] Nor does it allow misrepresentations in obtaining the policy to be of any consequence, unless the matters misrepresented shall have actually contributed to the death. [R. S. 1899, sec. 7890.]

In this case the defendant, claiming to be a fraternal beneficiary association, set up as separate defenses that deceased committed suicide, and that he represented that he had never had syphilis, which representation, it is alleged, was willfully false. The plaintiff contends, among other things, that defendant is not a fraternal beneficiary society and that, therefore, the

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statutes aforesaid in relation to general life companies applies to it. It was clearly shown that the deceased came to his death by suicide and it was not charged or claimed that he took out the policy with that view. We will furthermore assume, for the purpose of disposing of the case, that deceased made a false representation in stating that he had never been afflicted with syphilis when he obtained the policy. If defendant is a fraternal beneficiary company, those defenses would bar a recovery. If it is not, then the general insurance laws apply to the case.

The answer of defendant shows that it is an Iowa corporation doing business in this State by certificate from the Secretary of State as provided by our statute; and it further shows that under its own by-laws, the certificates of insurance issued by it could be made payable to "the legal representatives" and the widow or children of the deceased. The statute of Iowa authorizes such certificates to be issued to the "husband, wife, relative, legal representatives, heir, or legatee of such member." Our statute (sec. 1408, R. S. 1899) authorizes such certificates to be for the benefit of "families, heirs, blood relatives, affianced husband or affianced wife, or to persons dependent upon the member." It will thus be seen that the laws of Iowa and the by-laws of the defendant permit certificates to be issued to a class not recognized by our statute, viz.: legal representatives of the deceased. And in point of fact the certificate in this case was issued to the legal representative. Such certificate was, therefore, within the Iowa law and without our law. In Baltzell v. Modern Woodmen, 98 Mo. App. 153, we held that where the statute of the State where the company was organized and the statutes of this State differ, the latter controls.

We must, therefore, hold the certificate to be without the protection of our statute and to fall under the provisions of the general insurance statute. The beneficiaries of such certificate must be of the class or

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classes named in the statute. [Masonic Benefit Assn. v. Bunch, 109 Mo. 560, 578; Keener v. Grand Lodge, 38 Mo. App. 543.] A payment to one's legal representatives is a payment to his general estate and the money would be subject to administration as and like any of the deceased's general property, and in that way would frequently be entirely diverted from those our statute directs shall be the beneficiaries.

Nor does it aid the defendant in any respect that it called itself a beneficiary and fraternal society; or that the Secretary of State issued the statutory permission for it to do business in this State as such. The contract as evidenced by the certificate in this case shows the character the company assumed in this case. The Supreme Court has made the following utterances on such subjects:

In McDonald v. Life Ass'n, 154 Mo. 618, it said: "The certificate of the State Superintendent of Insurance authorizing a company to do business as an assessment company does not determine the character of insurance the company actually does. The policy determines that." And in Aloe v. Fidelity Mutual, 164 Mo. 675: "The fact that an insurance company was chartered by another State as an assessment company and was licensed to do business in this State under its laws as an assessment company, does not make it such, nor in any wise change its character or status under the Missouri law. Nor is the liability of the company in any wise affected by its name. That is determined by the character of its contracts of insurance, and by those contracts the law places the company in its proper class, and determines whether or not it is an assessment company." And in Logan v. Fidelity & Casualty Co., 146 Mo. 115: "The calling of a contract of insurance and accident, tontine, ordinary life, or bond investment policy, does not make it any the less a policy of life insurance, nor remove the policy from the operation of the statute."

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But under the general insurance statute misrepresentations may be shown in defense if the subject misrepresented caused the death. But there are two reasons why the defense cannot be made here, conceding, as before stated, that there were misrepresentations. One of these reasons is that there was no substantial evidence to show that the subject of such misrepresentation (syphilis) caused the death; and the other is, that the defendant did not deposit in court to be refunded the premiums which had been paid as provided by section 7891, Revised Statutes 1899.

We have examined the point made by defendant as to the sufficiency of plaintiff's abstract, and have concluded that the objections thereto are not well taken. The abstract presents the points we have considered and which determine the case.

The judgment is reversed and the cause remanded. All concur.

H. J. MINK, Defendant in Error, v. F. O. CHESNEY, Plaintiff in Error.

Kansas City Court of Appeals, March 6, 1905.

APPELLATE PRACTICE: Long Appeal: Abstract. Though a complete transcript of the case be filed in the appellate court the plaintiff in error must make an abstract under Rule 15 as provided in section 874, Revised Statutes, 1899, and failure to do so will be followed by a dismissal of the writ of error.

Error to Jasper Circuit Court.—*Hon. Hugh Dabbs*, Judge.

WRIT OF ERROR DISMISSED.

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James J. Hitt for appellant, filed brief on merits.

ELLISON, J.—In this case there is a motion to dismiss the writ of error for two reasons; one, that no notice of its issuance was given; and the other, that no abstract of the record has been filed. Since there is a dispute as to whether notice was given to respondent of the writ of error, we will pass that by and go to the second ground for dismissal.

The plaintiff in error has filed a complete transcript of the case. In other words, he has brought up the case on what is known as the long form. He now says that when an appeal or writ of error is by the long form, there need not be an abstract. That is an error which one is led into by his assuming that section 813, Revised Statutes 1899 (old section 2253, Revised Statutes 1889) is the only statute giving authority to require abstracts. That section, it is true, only applies to cases brought to the appellate court by the short form. But there is another statute (section 874, Revised Statutes 1899, old section 2312, Revised Statutes 1889), which gave authority to require printed abstracts before the enactment of the short form mode of appeal. So the fact that a full transcript is sent up is no excuse for failure to make and file an abstract. This was expressly ruled and explained in McQueen v. Groff, 105 Mo. App. 165.

The cases of Halstead v. Stone, 147 Mo. 649 and Clements v. Turner, 162 Mo. 466, were each taken to the Supreme Court by the long form, yet it was ruled that abstracts must be filed in compliance with the rules of that court. Our Rule 15 was adopted and in force under authority of a statute adopted in 1883 and carried forward into the revision of 1889 as section 2312, and of 1899 as section 874.

The writ of error will be dismissed. All concur.

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JOE McGINTY et al., Appellants, v. C. T. ORR, Respondent.

Kansas City Court of Appeals, March 6, 1905.

1. **PARTNERSHIP: Settlement: Balance: Action.** A partner may sue at law a partner on a promise to pay a balance which has been struck and agreed upon.

2. ———: ———: ———: **Promise.** But where there is merely a conditional promise and the condition has not been performed, no action at law to recover the balance can be maintained.

Appeal from Jasper Circuit Court.—*Hon. Hugh Dabbs*, Judge.

AFFIRMED.

George E. Booth and *W. R. Robertson* for appellants.

(1) It is well settled that one partner may sue another in an action at law where the business of the partnership is closed and there is but one unadjusted item growing out of the partnership business. Parsons on Partnership (4 Ed.), secs. 193, 194, 195; Feurt v. Brown, 23 Mo. App. 332; Byrd v. Fox, 8 Mo. 574; Whetstone v. Shaw, 70 Mo. 575; Bambrick v. Simms, 132 Mo. 51. (2) The statement filed in this case does not declare upon an account stated as it is not alleged that defendant agreed to pay plaintiffs' proportion on the amount found to be in his hands upon the settlement charged, and for that reason alone no account stated was alleged and, therefore, plaintiffs were not precluded by rules of evidence applicable in cases of actions upon accounts stated. Electrical Supply Co. v. Kroell, 85 Mo. App. 337; Lustig v. Cohen, 44 Mo. App. 271; Marion v. Waller, 53 Mo. App. 610; Willock v.

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Railroad, 79 Mo. 77; Prendergast v. Ins. Co., 67 Mo. App. 430. (3) The tender which defendant made was an admission which entitled plaintiffs to a verdict for that amount at least, and the court, therefore, erred in forcing the plaintiffs to a nonsuit. Berman v. Hoke, 61 Mo. App. 380. (4) The offer of plaintiffs to repair the pump in controversy which was injured by reason of the neglect of the defendant, after it was returned to and accepted by him, was without consideration and a nullity, and even though it were construed as an offer to compromise, it does not now estop the plaintiffs from asserting their rights irrespective of the offer since defendant would not permit them to comply with it. Cook v. Ins. Co., 70 Mo. 615; Realty Co. v. Ins. Co., 94 Mo. App. 360.

BROADDUS, J.—This suit was brought before a justice of the peace where it was tried and appealed to the circuit court. At the close of plaintiffs' case they were compelled to take a nonsuit. After the proper motion to have the nonsuit set aside the plaintiffs appealed.

The plaintiffs and defendant were engaged as partners in mining. They entered into business about December 7, 1903. Before the expiration of the month the parties agreed that they would cease mining operations which latter were abandoned a few days thereafter. Plaintiffs returned to defendant the machinery they had received from him which had been used in the business, including a certain pump. This pump froze and bursted—plaintiffs claim—after it had been delivered to defendant. The latter insisted that he had the right to retain enough of plaintiffs' share of the profits to repair the pump, but later on he claimed that they should furnish a new one. They agreed to pay for repairing the pump but refused to pay for a new one.

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It was shown that all the debts of the concern were paid.

Examination of the partnership by the parties disclosed that after payment of all liabilities there was a partnership fund of $77.90 on hand. The defendant tendered to plaintiffs each a check for $7, but would not agree to divide the residue of the fund until plaintiffs would repair said pump. To this they assented, but after they had taken it to a mechanic the defendant notified them that they must furnish a new one, which they refused to do. Plaintiffs' suit is to recover the balance of their share of the $56.90 on hand.

"The general rule is, that a partner may sue at law a partner on a promise to pay a balance which has been struck and agreed upon." [Parsons on Partnership (4 Ed.), sec. 193.] The Supreme Court of Missouri has adopted this general rule. [Bambrick v. Simms, 132 Mo. l. c. 51; Buckner v. Ries, 34 Mo. 357; Byrd v. Fox, 8 Mo. 574.]

The difficulty about plaintiffs' case is that there was not a settlement of the amount sued for and a promise by defendant to pay. The latter offered to pay $21 of the amount in controversy but plaintiffs refused to accept. He refused to settle and pay any part of the balance unless they would repair the pump, to which plaintiffs agreed. This was a conditional promise and the repair of the pump was not made. After defendant notified plaintiffs that they must furnish a new pump it does not appear that they had it repaired. Until this matter is determined there can be no settlement of the affairs of the partnership. If the plaintiffs are under obligations to repair the pump or furnish a new one it is impossible to say how much money will be on hand to distribute to the partnership. It is true that where a partnership has been adjusted in whole or in part, and a promise by one partner to pay to another his share thus adjusted, that part has been taken from the partnership account and an action at law may be

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maintained to recover it. [Sec. 193, idem.] Or, if a partnership has been settled and items are omitted from such settlement by agreement, an action at law may be maintained for a recovery for a partner's share in the same. But we know of no law that will permit an action at law of one partner against another to recover where one or more items have prevented a settlement and a promise to pay by the one to the other. But this promise to pay need not be an express promise: it may be implied, because a promise is implied in closing the books and stating the balance.

Here, there was no express promise, and there is no evidence on an implied one. Affirmed. All concur.

B. ADLER & CO., Respondents, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, March 6, 1905.

1. **JUSTICES' COURTS: Statement: Amendment: Departure.** A suit against the defendant company was for goods sold and delivered on an ordinary billhead of the plaintiff, on the back of which was indorsed "Damages for injury to goods in transit as per statement hereto attached." The summons was to answer a complaint founded on a petition for damages. The amendment in the circuit court was a claim against defendant as a common carrier for damages to goods in transit. *Held*, the indorsement on the back of the account could not vary or contradict it and the amendment was a substitution of another cause of action.

2. ———: ———: ———: **Intention.** The intention of the pleader must be ascertained from the contents of the pleading.

3. ———: ———: ———: ———. Section 3853, Revised Statutes 1899, refers to the amendment to a defective or insufficient statement and can have no application to a properly stated cause of action.

4. ———: ———: ———: **Pleading.** Pleadings in justices' courts are to be liberally construed but not so as to substitute one cause of action for another.

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Appeal from Jackson Circuit Court.—*Hon. W. B. Teasdale,* Judge.

REVERSED.

Pratt, Dana & Black for appellant.

(1) The plaintiffs' so-called amended petition first filed in the circuit court stated an entirely new and different cause of action from the statement of account filed in the justice court and tried there, and the circuit court erred in not striking it out on defendant's motion and in trying the issues made thereby over defendant's objection. R. S. 1899, secs. 3852, 4077 and 4079; Thieman v. Goodnight, 17 Mo. App. 429; Brennan v. McMenamy, 78 Mo. App. 122; Powell v. Shipps, 85 Mo. App. 467; Evans v. Railroad, 67 Mo. App. 260. (2) It was a case not of amendment, but of substituting a radically different cause of action. Sturges v. Botts, 24 Mo. App. 282; Jackson v. Fulton, 87 Mo. App. 238; Ross v. Land Co., 162 Mo. 329. (3) Nor can plaintiffs escape by claiming that the cause of action should be determined from the "back"—the indorsement upon the outside fold of the statement of account filed before the justice—instead of the inside or "face" of that statement. Heimburger v. Harrison, 83 Mo. App. 548.

Lathrop, Morrow, Fox & Moore for respondents.

(1) Pleadings before justices should be liberally construed, and much liberality is allowed in construing acts of the parties as well as of the justices themselves. Amendments are allowed to include any cause of action intended to be embraced in the original statement when such amendment will promote substantial justice. Mooney v. Williams, 15 Mo. 442; Weese v. Brown, 102

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Mo. 299; White v. Railroad, 92 Mo. 542; Manley v. Mfg. Co., 103 Mo. App. 135; McDermott v. Dwyer, 91 Mo. App. 185; Randall v. Lee, 68 Mo. App. 561; Horton v. Toenboehn, 68 Mo. App. 42; Lemon v. Lloyd, 46 Mo. App. 452; Forbes v. Shellabarger, 50 Mo. 558; Quinn v. Stout, 31 Mo. 160; McCartney v. Auer, 50 Mo. 395; Bradley v. Sweiger, 61 Mo. App. 419; Freet v. Railroad, 63 Mo. App. 548; Norton v. Railroad, 48 Mo. App. 387; Rowe v. Scheitz, 74 Mo. App. 602; Jackson v. Fulton, 87 Mo. App. 228; Lamb v. Bush, 49 Mo. App. 337; Hemans v. Fanning, 33 Mo. App. 50; Cameron v. Hart, 57 Mo. App. 142. (2) The statement lodged with the justice was sufficient to reasonably advise the opposite party of the nature of plaintiff's claim, and was sufficiently specific to be a bar to another cause of action. Force v. Squier, 133 Mo. 306; Van Cleave v. St. Louis, 159 Mo. 574; Weese v. Brown, 102 Mo. 299; Buschmann v. Bray, 68 Mo. App. 8; Calmes v. Haight, 85 Mo. App. 362; Lord v. Koenig, 7 Mo. App. 453; Butts v. Phelps, 90 Mo. 670; Nutter v. Houston, 42 Mo. App. 363; Leas v. Express Co., 45 Mo. App. 598; Witting v. Railroad, 101 Mo. 631; Gibbs v. Railroad, 11 Mo. App. 459; Lustig v. Cohen, 44 Mo. App. 271; Johnson v. Kahn, 97 Mo. App. 628; Walker v. Guthrie, 102 Mo. App. 420. (3) The summons served upon defendant correctly advised it of the cause of action it was called upon to defend. That cause of action was tried before the justice, defendant waived any right to question the sufficiency of the statement of the case tried by its appeal, and the same cause of action was tried in the circuit court on the amended petition as was tried before the justice. R. S. 1899, secs. 3859, 4060; Damhorst v. Railroad, 32 Mo. App. 350; Fond du Lac v. Bonesteel, 22 Wis. 251; Jeffrey v. Underwood, 1 Ark. 108; Baslett v. Mfg. Co., 83 Mo. App. 78; Goldsmith v. Candy Co., 85 Mo. App. 595; Meyer v. Ins. Co., 92 Mo. App. 392; Winer v. Maness, 94 Mo. App. 162.

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BROADDUS, P. J.—This suit was begun in a justice's court where judgment was rendered against the defendant by default, from which it appealed to the circuit court where it was tried anew, and where plaintiff again prevailed, and defendant again appealed. The suit, as originally instituted before the justice, was upon a statement in the form of an account which upon its face showed that it was for goods sold and delivered. In the circuit court plaintiffs were allowed to amend their statement making it a claim against the defendant as a common carrier for damages to goods while in transit. The defendant objected to the amendment on the ground that it was a substitute of one cause of action for another. The original account was made out on one of the billheads of the plaintiff and is headed as follows:

"St. Louis & San Francisco R. R.

"Bought of B. Adler & Co., Wholesale Millinery."

Then follows terms upon which goods were sold by plaintiffs and other matters, such as the number of their place of business, etc.; and then the different items of the account and the price of each. On the back of the paper is indorsed the style of the case, under which is written the words: "Damages for injury to goods in transit as per statement hereto attached $50." The summons to defendant is, to answer the complaint of plaintiffs founded upon a petition for damages.

The contention of plaintiffs is that defendant was sufficiently notified by said indorsement upon the account filed and by the recitation in the summons, of the cause of action it was required to answer. That is certainly true, but it does not necessarily follow that the parties are concluded thereby, otherwise plaintiffs might be compelled to try their case upon a cause of action they did not have. It is true, too, that section 3859, Revised Statutes 1899, provides that the summons

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shall state the nature of plaintiff's suit and the sum demanded. And it is held that a summons that fails to make such statement is void. [Reinhardt v. Kempf, 72 Mo. App. 646; Bradenburger v. Easley, 78 Mo. 659.] It needs no argument to refute the idea that an indorsement on the back of a pleading could have the effect of varying or contradicting the pleading itself. The indorsement may have been made by some person other than the pleader. In this instance it appears to have been made by the justice, as it resembles his handwriting.

Plaintiffs contend that they had the right to amend their statement, as it appears that their intention was to sue defendant as a common carrier and not for goods sold. The intention of the pleader must be ascertained from the contents of the pleading, and there is a wide difference between a cause of action for goods sold and one against a common carrier for goods damaged in transit.

Plaintiffs, however, insist that they had the right to amend under section 3853, idem. Said section refers to the amendment of defective or insufficient statements. The statement here was not defective or insufficient. It properly stated a good cause of action, consequently said section has no application.

Many authorities are cited to the effect that the law governing practice in justices' courts should be liberally construed, but none have been found authorizing an amendment substituting one cause of action for another. On the contrary, all the decisions of the State hold that it cannot be done.

For the reason given the cause is reversed. All concur.

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FULLER & BAGLEY, Appellants, v. JAMES A. ROSE et al., Respondents.

Kansas City Court of Appeals, March 6, 1905.

1. **LANDLORD AND TENANT: Lease: Interpretation.** What passes by a lease depends upon the intention of the parties to be ascertained from the instrument itself and the character and surroundings of the premises; and in the absence of stipulation the lessee of a business building acquires title to the whole of the building including both sides of the outer walls and has exclusive right to use the walls for all legitimate purposes.

2. ——: ——: ——: **Office Building.** The rights of tenants of an office building must be so curtailed that they will not interfere with each other, and one possesses the right to the support and enclosure of the outer walls, but the title to such walls remains vested not in the tenant but in the landlord who must maintain them for the benefit of all.

3. ——: ——: ——: ——. A landlord of an office building may deprive his tenants of any use of the outer walls by stipulations in his leases and then use the same for revenue purposes.

4. ——: ——: ——: ——: **Advertisements: Injunction.** A landlord of an office building, who by his leases denies his tenants any use of the walls for advertising their business, may not use such walls so as to inflict damages upon his tenants by placing thereon advertisements injuring the business of the tenants; but he cannot be enjoined from using the walls for advertising on the ground that such advertisements are not in good taste. There must be substantial damage.

Appeal from Jackson Circuit Court.—*Hon. W. B. Teasdale,* Judge.

AFFIRMED.

H. S. Julian for appellants.

(1) The outside walls of a tenement belong to tenant, and the court should have found for appellants. Baldwin v. Morgan, 43 Hun 355, 50 N. Y. Sup. 355; Riddle v. Littlefield, 53 N. H. 503. (2) Injunction was the proper remedy in this case and a mandatory

injunction could and should have been issued. High on Injunction (3 Ed.), sec. 708; High on Injunction (3 Ed.), secs. 1135-1142; Dickinson v. Canal Co., 15 Beavan 270; Howard v. Ellis, 4 Sand. Ch. (N. Y.) 587. (3) Restrictive covenants may be prevented by injunction. 11 Am. and Eng. Ency. of Law, 941; Harber v. Evans, 101 Mo. 661; Fox v. Mission School, 120 Mo. 359; Railroad v. Springfield, 85 Mo. 675.

Grant I. Rosenzweig for respondents.

(1) What passes in lease of rooms, apartments, flats, etc., in large buildings in cities: Patterson v. Graham, 140 Ill. 535; Booth v. Gaither, 58 Ill. App. 263; Winton v. Cornish, 5 Ohio 477; Harrington v. Watson, 11 Ore. 143; Hosher v. Hesterman, 58 Ill. App. 265; Lieferman v. Osten, 64 Ill. App. 578, 167 Ill. 93; Seidel v. Bloeser, 77 Mo. App. 172; McMahon v. Vickley, 4 Mo. App. 230; Wittey v. Quinlan, 38 Mo. App. 681; Paine v. Irvin, 44 Ill. App. 106; 1 Taylor, Landlord and Tenant, 175a; Shawmut v. Boston, 118 Mass. 125; Stockwell v. Hunter, 11 Metc. 448; Pevery v. Skinner, 116 Mass. 129; Fox v. Mission, 120 Mo. 359. (2) Legal damage must be shown. State v. Fladd, 26 Mo. App. 503; Weigel v. Walsh, 45 Mo. 560; Sills v. Goodyear, 80 Mo. App. 132; Bailey v. Culvert, 84 Mo. 540; Schuster v. Myers, 148 Mo. 429; Dickhouse v. Olderford, 22 Mo. App. 76; Tanner v. Walbrun, 77 Mo. App. 262; St. Louis v. Snyder, 30 Mo. App. 627; Rankin v. Charles, 19 Mo. 490; Abraham v. Krautler, 24 Mo. 69. (3) Wounded feelings no ground. Connell v. Western, 116 Mo. 34; Snyder v. Railroad, 85 Mo. App. 495.

JOHNSON, J.—Defendants are the owners of an office building seven stories high located in the business district of Kansas City. Plaintiffs, when this suit was brought, were the lessees of three adjoining rooms situated on the fifth floor and occupying a space the

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length of which, east and west, was some thirty feet; the breadth, north and south, twelve feet; and the height, twelve feet. These rooms were inclosed on the south and east by outer walls and windows therein; on the north and west by partition walls. The ground south of the building was vacant to the street; to the north, it was vacant for a distance of fifty or sixty feet. The building faced east on Grand avenue. It contained about one hundred rooms divided among some fifty tenants. The period of time covered by plaintiffs' lease began January 1, 1902, and ended December 31, 1904. During plaintiffs' tenancy the defendant Rose, owner of the building, caused a sign to be painted on the exterior of the south wall on the east end thereof extending from the top of the building to the ground and some thirty feet in width. This sign, painted in several colors, advertised the business of the defendant railway company. In execution and design it was a fair specimen of the signmaker's art. Plaintiffs do not claim any actual damage from its presence but assert that any advertising sign of this character upon an office building is offensive to their artistic taste, and in their eyes serves to cheapen the looks of the building; for which reason, and because the striking colors and design of this work of commercial art by contrast dimmed the lustre of their own signs painted upon the windows, they protested at the time the work was being done to the defendant Rose; and finding their objections unheeded, brought this suit: an injunction proceeding against the landlord, the railway company and the painters, all of whom were in the perpetration of the act complained of—and, it is perhaps needless to add, were actuated in what they did entirely by motives of gain.

It is plaintiffs' contention that under their lease the title to the comparatively small portion of the outer wall represented by the area thereof which incloses their rooms is vested in them, which, if true,

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would make the acts of defendants in painting and maintaining thereon a part of the objectionable sign a continuing trespass for which action would lie, regardless of the fact of actual damage. That which passes under a lease depends upon the intention of the parties to be ascertained from the instrument itself. The character and surroundings of the leased premises are also important factors to be considered in determining the extent of the demise as intended by the parties. [Winton v. Cornish, 5 Ohio 477; Harrington v. Watson, 11 Ore. 143; Lowell v. Strahan, 145 Mass. 1; McMahon v. Vickery, 4 Mo. App. 230.] In the absence of stipulation to the contrary the lessee of a building to be used for business purposes acquires, under his lease, title to the whole of the building, including both sides of the outer walls, which, of course, gives him the exclusive right to use the walls for all legitimate purposes, including that of advertising. [Riddle v. Littlefield, 53 N. H. 503; Baldwin v. Morgan, 43 Hun 355; McAdam on Landlord and Tenant, sec. 442; Witte v. Quinn, 38 Mo. App. 681.]

Obviously, the presence of a number of tenants in a single building restricts the extent of the demise to each and the rights and privileges incident thereto. The rights of all must be so curtailed that they will not interfere with each other. In this building all of the tenants possessed the right to the support and inclosure of the south wall, including the part thereof claimed by plaintiffs. It would lead to absurd conclusions to say that any tenant was vested with title to any portion of the outer walls. The title to them remained in the owner of the building, whose duty it was to maintain them for the benefit of all of the occupants. [Bank v. Boston, 118 Mass. 125; Lieferman v. Osten, 64 Ill. App. 578; Booth v. Gaither, 58 Ill. App. 263; McGinley v. Trust Co., 168 Mo. 257.]

It has been said by some authorities that tenants in buildings of this character whose rooms are inclosed

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by an outer wall, have the right to use such portion of the exterior thereof for the placing thereon of their signs; but such right is a privilege acquired from universal custom—a mere incident to, not a parcel of the demised premises—and consequently not derived from title. The landlord may deprive his tenants of such privilege by stipulations in the lease, in which case the ownership of the walls remaining in him, he may use their outside surfaces for purposes of revenue. [Knoeffel v. Ins. Co., 66 N. Y. 639; McAdam on Landlord and Tenant, secs. 407-8-9; Lowell v. Strahan, supra.]

In the case before us the parties expressly agreed in the lease that plaintiffs were to be denied the use of any of the walls of the building for advertising their business. They were restricted to the use of the windows for such purpose. Evidently it was the intention of the parties that no other right to the wall was to be demised to plaintiffs than that of support and inclosure. [Lowell v. Strahan, supra.]

The landlord on his part is required in the use made by him of the wall not to inflict damage upon his tenants. He covenanted to give them uninterrupted and peaceable possession of the respective premises, and, therefore, would have no right to place such advertising or other matter on the outside of his building as would tend to injure the business of any of his tenants. No such injury is proven nor even claimed by plaintiffs. Aesthetics lie beyond the cognizance of either equity or law in such cases. Damage of a more substantial nature must be involved. Offended taste will not support a cause of action. [Bailey v. Culver, 84 Mo. 540; State ex rel. v. Flad, 25 Mo. App. 503; Schuster v. Myers, 148 Mo. 429; State ex rel. v. Associated Press, 159 Mo. 458; Tanner v. Wallbrunn, 77 Mo. App. 262.]

Other points are made which will not be noticed here. What we have said disposes of the case. The judgment is affirmed. All concur.

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WYNONA C. ARCHER, Respondent, v. UNION PACIFIC RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, March 6, 1905.

1. **PASSENGER CARRIER: Who, Passenger and When: Car: Privilege.** A person, though intending to become a passenger, who uses a station for a lounging room without the expectation of the arrival of a train, cannot claim the high degree of care extended to a passenger; and where a person uses a merely permissive privilege optional with the user, such as occupying a car on a side track, the duty due to such person is no other than the duty one owes to another who may come upon his premises by express or implied invitation.

2. **NEGLIGENCE: Use of Premises: Invitation: License.** The distinction between an invitation and a license, though difficult often to make, appears to be that the invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or profit of the party using it.

3. **PASSENGER CARRIER: Negligence: Use of Premises: Invitation: Evidence.** Plaintiff was one of a company using a hired car for a going and a returning trip. This car warmed and lighted stood on a side track at the returning terminus with permission to members of the party to use the same between its arrival and departure. The evidence relating to plaintiff's injury while returning to the car in the interval is considered and held insufficient to support an action, since plaintiff was at the time not a passenger and the defendant was not guilty of negligence regarding the defect in a frog in its track, and the plaintiff was guilty of contributory negligence in leaving a smooth path to cross the track in a hurry to get in the car.

Appeal from Jackson Circuit Court.—*Hon. W. B. Teasdale*, Judge.

REVERSED.

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N. H. Loomis, R. W. Blair and *I. N. Watson* for appellant.

(1) Unless plaintiff was a passenger at the time she was injured, she cannot recover under the allegation of the petition. Brown v. Scarbro, 97 Ala. 316. (2) We contend that plaintiff was not a passenger at the time of her injury, but was a licensee. The law applicable to this state of facts is well stated in Phillips v. Railroad, 124 N. C. 123; Hutchinson on Carriers, sec. 562; Dowd v. Railroad, 84 Wis. 105; Benson v. Traction Co., 20 L. R. A. 714; Beach on Contributory Negligence, sec. 51; De Bald v. Railroad, 14 Atl. Rep. 576; Redigan v. Railroad, 28 N. E. 1133; Welch v. McAllister, 15 Mo. App. 492. (3) Our contention is that there was no evidence to submit this issue of negligence to the jury and manifest error was committed by the court in doing so.

William T. Jamison for respondent.

(1) Negligence in the construction of the frog and guard rail is proven by an abundance of testimony of defendant's own employees. This question of fact having been properly submitted by the court to the jury, the finding of the jury, there being sufficient testimony upon which to base their verdict, will not be by this court interfered with. It is no doubt useless to cite authorities on this proposition to this court. Strode v. Abbott, 102 Mo. App. 169; Gribble v. Everett, 98 Mo. App. 32; Contracting Co. v. Roofing Co., 98 Mo. App. 78; Woody v. Railroad, 104 Mo. App. 678; Chapin v. Stahlmuth, 102 Mo. App. 299; State v. Peebles, 178 Mo. 475; State v. McKenzie, 177 Mo. 699; Merton v. Case Co., 99 Mo. App. 630. (2) Defendant was guilty of gross negligence in not properly lighting said yards and tracks; plaintiff had been invited and directed to go to the car in question in the nighttime by defendant's agents, and relied upon their direction, which as

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a matter of law she had a right to do. The plaintiff did not know of their dangerous condition, but thought the tracks and yards were "smooth and nice." (3) The court did not, therefore, err in submitting to the jury by instruction numbered 2, for the plaintiff, the question of negligence in failing to light said yards and track. There was abundant evidence upon which to rest the verdict of the jury, and it being based upon sufficient testimony, will not be by this court disturbed. Strode v. Abbott, 102 Mo. App. 169; Gribble v. Everett, 98 Mo. App. 32; Contracting Co. v. Roofing Co., 98 Mo. App. 78; Woody v. Railroad, 104 Mo. App. 678; Chapin v. Stahlmuth, 102 Mo. App. 299; State v. Peebles, 178 Mo. 475; State v. McKenzie, 177 Mo. 699; Merton v. Case Co., 99 Mo. App. 630.

ELLISON, J.—The plaintiff brought this action for damages resulting to her on account of personal injuries received by her (as she alleges) through the negligence of defendant. She prevailed in the trial court.

It appears that in February, 1901, the Ancient Order of Pyramids of Kansas City, Missouri, engaged an ordinary passenger car of defendant in which defendant was to convey a number of members to Topeka, Kansas, and return. The party (including plaintiff) arrived at Topeka about six o'clock in the evening, when they proceeded to a hall in the city. The car was taken off of the main track and set in on a side, or "house track," about two hundred and fifty feet from the station, where it was to be "picked up" by the train passing Topeka at an early hour the next morning and brought back to Kansas City. The defendant's division superintendent telegraphed the station agent at Topeka where to place the car during the night. The dispatch also read: "See these people and see if there is anything we can do for them. . . . Car

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repairer will have instructions to keep the car warm and clean."

On the arrival at Topeka the station agent stated to representatives of the party, in the presence of plaintiff, that any time they wanted to go to it, the car would be lighted and warm. Plaintiff stated that her understanding was that the car was going to be set aside in the switch yards where it could be occupied by any of the party at any time during the night. Between four and five o'clock in the morning, which, at that season, was before daylight, plaintiff with about twenty others of the party left the hall and proceeded to the car. She attempted to pass around the end of the car from the south to the north side of the track when she caught her heel in a switch frog which caused her to fall and receive serious injury.

Plaintiff was a passenger on defendant's road while going to and returning from Topeka. But she was not a passenger, and defendant owed her no duty as such, while she remained in that city, except for such reasonable period before train time as she would be at or in defendant's station building in order to get aboard the train upon which she was to return. Save in exceptional instances, a person though intending to become a passenger, who uses the station as a lounging room without expectation of arrival of a train, cannot claim the high degree of care extended to passengers. The car was kept lighted and heated so that if plaintiff and others preferred to return to it during the night instead of remaining in the city proper, or instead of going to the station itself, they could do so. It was merely for the accommodation of those who preferred that course. It was merely a permissive privilege, optional with plaintiff, and so she stated. Defendant, therefore, owed no duty to them further, at the very most, than the duty any one owes to another who may come upon his premises by express or implied invitation. What is that duty?

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In the case of Bennett v. Railway, 102 U. S. 577, it is said that, "the owner or occupant of land, who induces or leads others to come upon it for a lawful purpose, is liable in damages to them, they using due care, for injuries occasioned by the unsafe condition of the land or its aproaches, if such condition was known to him and not to them, and he negligently suffered it to exist without giving timely notice thereof to them or the public." In Carleton v. Franconia Co., 99 Mass. 216, the court said: "The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business being transacted with, or permitted by him, for any injury occasioned by the unsafe condition of the land, or of the access to it, which is known to him, and not to them, and which he has negligently suffered to exist and has given them no notice of it. . . ." Judge Gray said of that case that it could not "be distinguished in principle from that of the owner of land adjoining a highway, who, knowing that there was a large rock or a deep pit between the travelled part of the highway and his own gate, should tell a carrier, bringing goods to his house at night, to drive in, without warning him of the defect . . ."

It is sometimes difficult to distinguish between an invitation and a mere license to come upon one's premises. This was recognized and adverted to by Judge Harlan in Bennett v. Railway, supra 584. The distinguished judge quoted from Campbell on Negligence that, "the principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it." We have considered this case as one of invitation in deference to the contention of plaintiff's counsel. But we do not wish to be understood as ruling that the case is anything more than mere permissive license.

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As a licensee there would be required of defendant less duty to plaintiff than if she was invited in a sense of benefit to defendant. The case is regarded by defendant's counsel as one of license only and we are cited to the following cases as authority for the position. [18 Amer. and Eng. Ency. of Law (2 Ed.), 1136; Dowd v. Railway, 84 Wis. 105; Welch v. McAllister, 15 Mo. App. 492; Diebold v. Railway, 50 N. J. L. 478.]

In the light of these authorities (whether discusing an invitation or a license) a fuller statement of the evidence, mainly that of the plaintiff herself, will demonstrate that she is without legal standing. It appears, as before stated, that the car was put on a side track (just clear of the main track) about two hundred and fifty feet west of the station house, the ends of the car being east and west. The east end of the car, therefore, faced towards the station and was nearest thereto.

There was an unobstructed, level and smooth cinder walk, twenty-five feet wide, leading on the south side of the track from the station down to the car. Plaintiff with several others came from the south walking north along the street until she came to the station house which was open and lighted and some of the others went in and remained there, but plaintiff and "the crowd" turned west walking along this cinder walk on the south of the track until she got about to the end of the car, when, in order not to wait for those ahead of her who were getting into the car from the south side, she concluded to enter from the north side, and in attempting to cross over the track for that purpose caught her foot in the defective switch frog and fell.

It seems to us to be manifest that defendant, in consideration of the fact that plaintiff was not at that time a passenger, and in consideration of the nature of the duty which defendant owed her, was not guilty of

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negligence, notwithstanding the frog in the switch may have been defective.

On the other hand, in consideration of the facts just stated, the plaintiff was herself guilty of negligence. The defendant placed the car on a smooth and unobstructed walk leading directly to the steps of the car; but plaintiff, in her impatience and hurry to get inside (it being cold) chose to attempt to cross over to the other side, when, unfortunately, her heel caught and she fell.

If in the roadway leading to the car there had been a pitfall, or other dangerous obstruction, as illustrated in Carleton v. Franconia Co., supra, into, or over which plaintiff had fallen, she would have just and legal cause of complaint. But she has not such cause when she met an obstruction by leaving the direct course provided by defendant and attempted the indirect way.

The judgment should be reversed. All concur.

G. L. CRENSHAW, Respondent, v. COLUMBIAN MINING COMPANY et al., Appellants.

Kansas City Court of Appeals, March 6, 1905.

1. **GAMING: Election Bet: Recovery of: Execution Purchaser.** A purchaser at an execution sale is not within the statute allowing the recovery of property lost in gaming and has no right legally or equitably as against the winner thereof.

2. ———: ———: **Dividend of Corporation Stock.** Plaintiff won some stock in a corporation on an election bet and the loser assigned and delivered the same to the plaintiff who presented them to the secretary of the corporation for transfer, which was not done, but some dividends were paid thereon. *Held,* he was the absolute owner of the stock and the refusal to transfer the stock in no manner affected his title or his right to the dividends.

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3. ———: ———: **Winner's Title: Corporation Stock.** A corporation cannot set up as a defense to an action for dividends due on its stock, that the plaintiff won the same on an election bet, where the defense is asked not in the interest of morality but to aid one who is one of its stockholders and its treasurer and not the loser, when the plaintiff can make out his case independently of his illegal conduct.

4. **CORPORATION: Transfer of Stock: By-Laws: Statutory Construction.** Section 965, Revised Statutes 1899, referring to transfer of stock nor by-laws made in pursuance thereof were intended to prevent the alienation of the corporation stock, but merely to enable the company to deal with intelligence with its stockholders; such stock being personal property, can be sold and its transfer on the books of the company be compelled by the courts.

5. ———: **Dividends: Debts.** A judgment for the right party awarding certain dividends of stock will not be interfered with on the ground of the possibility of debts due by the corporation, especially where the plaintiff is solvent.

Appeal from Bates Circuit Court.—*Hon. W. W. Graves*, Judge.

AFFIRMED.

Cole, Burnett & Moore for appellant.

(1) Was the conveyance of shares 25, 26 and 27 from D. C. Brandon to plaintiff, G. L. Crenshaw, void, the consideration being payment of an election bet or wager? The answer is yes. R. S. 1899, secs. 2211, 3426, 3430; Schropshire v. Glascock, 4 Mo. 536; see authorities on 2 and 3 below. (2) Does section 3431 of the statutes (stakeholder section) requiring suit to recover to be brought in three months deprive a defendant of the defense that the contract was a prohibited one, when such defense is presented at a later date, that is, after the three months provided by section 3432 has expired? The answer to this question is no. Richter v. Merrill, 84 Mo. App. 150, 154; Roff v. Harmon, 64 S. W. 755; Spurlock v. Dougherty, 81 Mo. 171; Mason v. Crowder, 85 Mo. 526; Buckingham v. Fitch.

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18 Mo. App. 91; Morris v. White, 83 Mo. App. 194; Hayden v. Little, 35 Mo. 418; Williamson v. Bailey, 78 Mo. 636; see authorities under 3 below. (3) Will a court aid the winner in a gambling contract or on a wager to consummate or establish a right to his winnings, he being unable to realize upon or to establish such right and to enjoy the full fruits of such gambling contract or wager without the aid of a court? The answer to this question is no. Hayden v. Little, 35 Mo. 418; Woolfolk v. Duncan, 80 Mo. App. 427; Morris v. White, 83 Mo. App. 194, 196; Keim v. Vette, 167 Mo. 402; Ulman v. Fair Ass'n, 167 Mo. 273; Sprague v. Rooney, 104 Mo. 349; Keating v. Kansas City, 84 Mo. 419; Loan Ass'n v. Cass L. & C. Co., 138 Mo. 394; Swing v. Cider & Vinegar Co., 77 Mo. App. 391; Gibbs v. Gas Co., 130 U. S. 396, 32 L. Ed. 979; Snoddy v. Bank (Tenn.), 7 L. R. A. 705; Kellogg v. Howes (Cal.), 6 L. R. A. 588; Harvey v. Merrill (Mass.), 5 L. R. A. 200; Sprague v. Warren (Neb.), 8 L. R. A. 678; Irwin v. Williar, 110 U. S. 499, 28 L. Ed. 225; State v. Burgdoerfer, 107 Mo. 22-23; Buckingham v. Fitch, 18 Mo. App. 91; Rozelle v. Bank, 141 Mo. 40; Shafer v. Pinchback, 133 Ill. 403. And there is nothing new in the doctrine: 1 Pomeroy, Eq., sec. 402, p. 547; 2 Pomeroy, Eq., sec. 940, p. 1350; Adams, Eq. (8 Ed.), 174; 1 Story, Eq., 301; Hooker v. DePaloss, 28 Ohio St. 257; Skinner v. Henderson, 10 Mo. 205; Herman v. Jencher, 15 Q. B. 561. Illustrative of the above points, 1, 2 and 3, we here copy paragraphs from the reports above cited: "The cases in this country are uniform in declaring the principle that if a note or other contract be made in consideration of an act forbidden by law, it is absolutely void and the illegality of the contract will constitute a good defense at law as well as in equity." Swing v. Cider & Vinegar Co., 77 Mo. App. 398. "No positive law exists for the protection of transactions growing out of and founded upon bets and wagers. . . . They are

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contrary *bonos mores* and the courts will refuse to enforce contracts growing out of them.'' State v. Burgdoerfer, 107 Mo. 23. "The answer of an indorser on a note setting up that the indorsement had been made as a bet on a horse race presented a good defense, though it was in effect an attempt to recover the property lost on the race and was filed more than ninety days after the debt was paid. Roff v. Harmon, 64 S. W. 755; Hayden v. Little, 35 Mo. 418; Morris v. White, 83 Mo. App. 194; Richter v. Merrill, 84 Mo. App. 150; Loan Assn. v. Cass, etc., 138 Mo. 394; Woolfolk v. Duncan, 80 Mo. App. 421; Ordelheide v. Railroad, 80 Mo. App. 368; Morris v. White, 83 Mo. App. 197; State ex rel. v. Ins. Co., 152 Mo. 1; Karnes v. Ins. Co., 144 Mo. 413; Bank v. Farris, 77 Mo. App. 186; Miles v. Withers, 76 Mo. App. 87; State ex rel. v. Railroad, 153 Mo. 157; Cravens v. Ins. Co., 148 Mo. 583. (2) The court committed error against this defendant in adjudging that this defendant should pay plaintiff the sum of $13.65, on the basis that as the Columbian Mining Company, defendant, had on hand in its treasury the sum of $152.48; that then plaintiff was entitled to recover from the company the proportion of said sum of $152.48 that plaintiff's alleged six shares bears to the sixty-seven shares of the corporate stock of said company outstanding. The court had no power to declare a dividend on the facts in evidence for defendant company, for the plaintiff, or for anybody else. The court went beyond its jurisdiction when it attempted to do so.

Thurman, Wray & Timmonds for respondent.

(1) Where a cause of action embraces branches of equity jurisdiction, courts of equity assume jurisdiction and retain such jurisdiction of the cause throughout, in order that full and complete justice may be done, even where a remedy at law exists. Cabanne v. Lisa, 1 Mo. 682; Janney v. Spedden, 38 Mo.

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395; Harper v. Rosenberger, 56 Mo. App. 388; Verdin v. St. Louis, 131 Mo. 26; Humphreys v. Milling Co., 98 Mo. 542; Sutton v. Hayden, 62 Mo. 112; Koch v. Hebel, 32 Mo. App. 103; Sharkey v. McDermott, 91 Mo. 647; Baile v. Ins. Co., 73 Mo. 384; Lingenfelter v. Ins. Co., 19 Mo. App. 264; Reyburn v. Mitchell, 106 Mo. 365; Woodard v. Martin, 106 Mo. 324; Jordan v. Harrison, 46 Mo. App. 172; Morrison v. Herrington, 120 Mo. 665. (2) The transfer and delivery of stock in a corporation by a stockholder, after indorsement thereon, authorizing the transfer on the books of the corporation, passes title of the stock as between the stockholder and transferee, and as against a creditor, if the purchaser demands a transfer of the stock on the books of the corporation, even though its officers fail or neglect to make such transfer. Bank v. Richards, 6 Mo. App. 454; affirmed 74 Mo. 77; Wilson v. Railway, 108 Mo. 588; Ins. Co. v. Goodfellow, 9 Mo. 150; Moore v. Bank, 52 Mo. 379; Spring Co. v. Harris, 20 Mo. 390; Bank v. Durfee, 118 Mo. 442; Halgele v. Store Co., 29 Mo. App. 492. (3) A court of equity will compel a corporation to transfer stock on its books, assigned by one stockholder to another, on the ground that a corporation is a trustee for all its stockholders, and a refusal to transfer such stock is a breach of the duty of such trustee. Keller v. Mfg. Co., 43 Mo. App. 88; Secret Service Co. v. Mfg. Co., 125 Mo. 140; Cushman v. Mfg. Co., 75 N. Y. 365. (4) Before the gaming statute was enacted the property wagered belonged to the winner, but the gaming statute gave the loser, his heirs, executors, administrators and creditors, a right to recover the property lost. R. S. 1899, secs. 3424-3425. (5) The defendant, the Columbian Mining Company, although pleading the gaming contract, does not come within any of the provisions of the statute against gaming, and cannot defeat plaintiff's action by such defense. It is a trustee for the stockholders of the corporation, and it can be of no concern to it, who the

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stockholders are, how they obtained their stock, whether they paid for it, or it was given to them, its certificates of stock are in a manner *quasi*-negotiable paper, subject to being transferred at the pleasure of the owner. Bank v. Richards, 6 Mo. App. 461, 74 Mo. 77. (6) If defendant Egger can make the defense that the transfer of the three shares of stock by Brandon to plaintiff is void, under the statute against gaming, it is, by virtue of the statute, authorizing a creditor to set aside such conveyance. We insist that he is not within that statute; that his pleading does not show that he is within the statute; that his pleading and the facts show that he is barred by the limitation of the statute creating such right. The limitation is three months. At the time of his purchase, neither he nor his father, F. Egger, the creditor of Brandon, who was solvent, had the right to set aside the transfer. R. S. 1899, sec. 3432. (7) The right to recover back property that has been lost in gaming is limited to three months, and cannot be revoked afterwards. R. S. 1899, sec. 3432; Connor v. Black, 132 Mo. 150; Cutshall v. McGowan, 98 Mo. App. 705. (8) A purchaser at executtion sale buys only the interest the execution defendant had in the property sold, and acquires no other rights in the property. Rosenberger v. Jones, 118 Mo. 559; Burke v. Seely, 46 Mo. 334; Hagman v. Schaffner, 88 Mo. 24; Freeman on Executions, secs. 301, 335.

BROADDUS, P. J.—This suit was commenced on the 25th of June, 1901. The defendant is a mining corporation with an organized capital of $10,000 divided into one hundred shares of the par value of $100 each, but thirty-three shares thereof have been cancelled, leaving sixty-seven shares representing the present capital stock. Shares Nos. 25, 26 and 27 were issued to one H. C. Brandon. The plaintiff claimed to be the owner of these shares but the defendant company re-

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fused to recognize him as such and to permit him to share in its dividends. The defendant, Egger, also claims to be the owner of said shares, basing his title upon a purchase made at a sale under execution issued upon a judgment against said Brandon. This sale and purchase was made after the time that plaintiff claims he became the owner of such stock. The plaintiff admitted that the consideration for the transfer of the sale of the stock by Brandon to himself was a wager on the result of an election. On the 10th day of November, 1896, Brandon, in writing, assigned and delivered the stock to plaintiff. At that time plaintiff was engaged in the business of banking and a Mr. Avery was his bookkeeper, also the secretary of the mining company. Avery knew that plaintiff owned the shares of stock, according to plaintiff's evidence, and that he wanted him, as secretary of the mining company, to transfer them on its books to him. He says he put them in a pigeonhole where Avery kept the books of the company and that Avery knew where they were; that he also took the certificate book and found the numbers corresponding with the numbers of said shares and wrote his name on the stub of each certificate; that his recollection was that he called Avery's attention to the matter and he replied, "all right;" that some time afterwards he put them in a pigeonhole where he kept his papers; and that he had received from the mining company dividends on said certificates of stock in the year 1897 and in 1898. Warrants for the different dividends paid were in evidence.

Avery testified that he had no recollection of plaintiff's request, immediately after the election in 1896, to make an entry on the company's books of the assignment by Brandon to him of said shares. But he did recollect that such request was made by plaintiff after the levy upon them by the officer under the execution mentioned, but that he refused to make the transfer on the books because of said levy. The stock was after-

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wards transferred on the books of the company in the name of defendant Egger. One of its by-laws required that a transfer of its stock should be made only upon the books of the mining company. There was evidence that at the time of the transaction mentioned, Brandon was solvent; and also evidence to the contrary.

Plaintiff asks that the mining company be compelled to transfer said shares of stock on its books to him and for a judgment for the amount of unpaid dividends. The court rendered judgment in favor of plaintiff and defendants appealed. The contention of of appellants is that as the consideration for the sale of the stock in question was unlawful, a court of equity will not interfere to aid plaintiff in consummating it.

Section 3424, Revised Statutes 1899, is: "Any person who shall lose any money or property at any game or gambling device may recover the same by civil action." Section 3925, idem, gives the right of recovery to the heirs, executors, administrators and creditors of the person losing against the winner, as provided in the preceding section. Section 3430 makes betting on an election gaming within the meaning of this act. Section 3432 requires that such action be commenced within three months from the time the cause of action accrued. Section 2211, idem, makes betting on elections a misdemeanor punishable by fine.

On the other hand, plaintiff, although admitting the principle that "where the establishment of plaintiff's cause of action requires the proof of an illegal transaction to sustain it, the courts will deny the plaintiff any aid, but, if the plaintiff can establish his cause of action without proof of an illegal transaction, although his first connection with the subject of the transaction may have been in violation of positive statute, or against public policy, the doctrine of 'clean hands' does

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not apply." We will consider the plaintiff's proposition first. Under the statute referred to, betting on the election was contrary to law—*malum prohibitum.* Not only was the act unlawful, but the loser, creditors, heirs or administrator could recover the property lost, provided suit was instituted for that purpose within three months from the time the cause of action accrued. No action was instituted by Brandon or any other person authorized to sue for the recovery of the stock in question. The assignment and delivery of the stock by Brandon to plaintiff completed his title to the same, unless the by-laws of the company requiring such transfers on its books was necessary to make such title complete. The refusal of the secretary of the company to enter the transfer on its books was based upon the ground that the stock had been levied on to satisfy a judgment against said Brandon, and not upon the ground that they had been wagered and lost by him on the result of an election. The defendant, Egger, who was made a party defendant on his own motion, claims the stock by reason of his purchase at the constable's sale, and not as a creditor. He is not, according to his own showing, entitled to any right, legal or equitable, as against plaintiff. It was, therefore, immaterial whether at the time he transferred the stock to plaintiff, Brandon was solvent or otherwise, the transfer having been made before Egger's purcase at constable's sale. The whole question, then, rests as between plaintiff and defendant company. But if plaintiff loses in the suit against defendant company it will be in a condition to recognize Egger as owner under his purchase at said constable's sale. The defense interposed apparently is, therefore, to defeat plaintiff's claim and make good that of Egger. It is the defendant company that raises the issue as to plaintiff's right to relief asked, not in the interest of morality but to aid one whom the evidence shows to be its treasurer and one of its stockholders.

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A question similar in principle was decided in Roselle v. Beckemeir, 134 Mo. 380, where the facts were: "Several parties in Missouri agreed to 'pool' their tickets in the Louisiana lottery; the tickets drew several prizes; one of the parties (plaintiff in this case) obtained a draft for the whole prize money; he indorsed the draft to a bank upon an agreement that it should (for a consideration) collect the proceeds, pay part thereof to plaintiff and another specified part to Beckemeir, who was a party to that agreement. *Held*, that the illegality of the original transaction was no bar to the recovery by Beckemeir of his part of the proceeds of the draft." The principle upon which the decision is founded is: "A party seeking to recover on a contract cannot be defeated from recovery by reason of illegality in his prior conduct, when he can make out his case independently of his illegal conduct." Dealing in lottery tickets was prohibited by the laws of Missouri and obtaining a draft as a prize won in such lottery was illegal by reason of the law, but the agreement to divide the proceeds after the draft was collected was not illegal, because in making out his case he could do so without proof of the original transaction which was illegal. See, also, Live Stock Association v. L. & C. Co., 138 Mo. 394.

The appellants to support their theory of the case cite Woolfolk v. Duncan, 80 Mo. App. 422, where the action was to recover on a note given as a settlement of a bet on the result of an election. It was, therefore, an effort to enforce the collection of a demand, the consideration for which was illegal. The court held that the contract was void and: "No action lies upon an unlawful consideration and a contract growing out of an illegal or immoral transaction," etc. Morris v. White, 83 Mo. App. 194, is a case where suit was brought upon a promissory note by an innocent holder, the consideration for which was a gambling debt. The plaintiff was not permitted to recover because the

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statute made such note uncollectible. In Keim v. Vette, 167 Mo. 389, it is held: "A pledge of notes to secure a valid indebtedness is illegal and void as to every person whose rights are affected by it if it is tainted with usury. The illegality of the pledge made by the fraudulent depositary or bailee of the notes may be raised by the true owner of the notes. He, as to such pledge, is not a stranger." In Ullman v. St. Louis Fair Association, 167 Mo. 273, it is held: "A contract which by its terms sells to certain persons the exclusive privilege of betting and bookmaking on a race course, is a contract for gambling with the public, and being such the courts will not aid either party thereto in its enforcement."

The appellants have cited numerous other decisions, none of which sustain their position; and we do not deem it necessary to specifically notice them in this opinion. It will be perceived that those given are cases where the courts have refused to enforce unlawful contracts or afford relief from such contracts. They differ materially from the one in hand, as the latter is not to enforce an illegal contract, but is based upon a showing independent of the anterior illegal transaction. At the time plaintiff presented the certificate of stock to said secretary he was the absolute owner of the same as against the world, and the refusal of the company to enter the transfer on his books in no way affected his title.

It is true defendant's by-laws provide that the stock of the association shall be transferred on its books, and section 965, Revised Statutes 1899, provides that the stock of all corporations shall be transferable in the manner provided by their by-laws. But neither said statute nor by-laws was intended to prevent the alienation of corporation stock. But the object of such regulations was to enable corporations to deal with intelligence with its stockholders. By such means corporations are enabled to know to whom to pay dividends, who are entitled to vote for directions and other

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necessary matters. Corporation stock is declared by said section to be personal property; and as such it can be sold and transferred to the purchaser, and such purchaser has the right to have the transfer entered on the corporation books in the manner provided by its by-laws. And if it fails or refuses to do so without good excuse, it is within the province of a court to compel it to make such transfer.

Appellant contends that the court committed error in adjudging that the company pay to plaintiff the sum of $13.65 on the basis that it had in its treasury the sum of $152.48, it being his proportionate share of the same. The finding of the court is, that the company has disposed of all its property and effects except said sum of $152.48 and that the same belongs to the owners of the stock. The chief objection to the action of the court is that shareholders are not entitled to any share in the capital stock, nor to any dividends, until all the debts of the corporation are paid; and that the holders of stock would become personally liable to creditors if a dividend should be declared under the circumstances. But there is no evidence of indebtedness by the company. The evidence indicates that it had gone out of business having disposed of most of its property, and the legitimate inference is that it had paid its indebtedness. In any event, plaintiff, who was shown to be solvent, would be liable to a creditor for his proportionate share of said dividends. The error, if one, is too insignificant to authorize the disturbance of a judgment otherwise for the right party.

Affirmed. All concur.

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JAMES M. ADAMS, Respondent, v. McCORMICK HARVESTING MACHINE COMPANY, Appellant.

Kansas City Court of Appeals, March 27, 1905.

1. **MASTER AND SERVANT: Pleading: Petition: Negligent Fellow-Servant.** Whatever the rule in other jurisdictions, in Missouri it is sufficient if a petition by a servant for the negligence of the master alleged the defect was known to the latter without being known to the former; and though a petition allege that plaintiff was aware of the incompetency of his fellow-servant and had notified the master thereof, yet the fact would not preclude a recovery unless the danger was so apparent that a reasonably prudent person would not have continued in the service; and such matters are affirmative defenses to be pleaded, and the petition considered in the opinion is held sufficient.

2. ———: **Negligent Fellow-Servant: Presumption: Instruction.** Where a servant knows that a certain platform about which he is to work had been placed in position by a negligent fellow-servant, it is error to tell the jury that he had a right to presume that the platform had been properly placed, since it is equivalent to instructing them to find for plaintiff on the pivotal point in the case.

3. ———: ———: ———: ———. While it is presumed that everyone exercises ordinary care, yet, where there is evidence tending to remove the presumption, reference to such presumption in an instruction is usually to be avoided.

4. ———: ———: ———: **Evidence: Jury.** Evidence is reviewed and held sufficient to send to the jury the question of plaintiff's contributory negligence in working about the platform which he knew to have been placed in position by a negligent fellow-servant without looking to see whether the same was securely placed.

Appeal from Jackson Circuit Court.—*Hon. W. B. Teasdale*, Judge.

REVERSED AND REMANDED.

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Gilmore & Brown for appellant.

(1) Under the pleadings and the evidence plaintiff is not entitled to recover against defendant. Carter v. Baldwin,—Mo. App. 59, 81 S. W. 204; Browning v. Kasten, 107 Mo. App. 59, 80 S. W. 354; Beymer v. Packing Co., 106 Mo. App. 726, 80 S. W. 685; Hester v. Packing Co., 95 Mo. App. 16; Price v. Railroad, 77 Mo. 508; Epperson v. Tel. Co., 155 Mo. 346; Steinhauser v. Spraul, 127 Mo. 541; Fulger v. Boethe, 117 Mo. 475; Condon v. Railroad, 78 Mo. 567; Watson v. Coal Co., 52 Mo. App. 366; Marshall v. Press Co., 69 Mo. App. 256; McDermott v. Railroad, 87 Mo. 285; Coontz v. Railroad, 115 Mo. 669; Warmington v. Railroad, 46 Mo. App. 159; Dale v. Railroad, 63 Mo. 455; Waldhier v. Railroad, 87 Mo. 37; Delvin v. Railroad, 87 Mo. 545; Sullivan v. Railroad, 107 Mo. 66; Smith v. Railroad, 69 Mo. 32; Aldridge v. Railroad, 71 Mo. 164; Donahoe v. Kansas City, 136 Mo. 657. (2) The opinion in the former appeal that plaintiff was entitled to go to the jury is not *res adjudicata* upon this appeal. Rutledge v. Railroad, 123 Mo. 121; Hamilton v. Marks, 63 Mo. 167; Bird v. Sellers, 122 Mo. 23; Bealey v. Smith, 158 Mo. 515; Mfg. Co. v. Troll, 77 Mo. App. 339; Leeser v. Boekhoff, 38 Mo. App. 445; Baker v. Railroad, 147 Mo. 140. (3) Plaintiff's petition does not state a cause of action and for that reason defendant's objection to the instruction of any testimony should have been sustained. Railroad v. Stupak, 108 Ind. 1; Malm v. Thelin, 47 Neb. 686; Coal Co. v. Norman, 49 Ohio St. 598; Railroad v. Doyle, 49 Texas 190; Stephenson v. Duncan, 73 Wis. 404; Bogenschutz v. Smith, 84 Ky. 330; 13 Ency. Pl. and Pr., 904, 906. (4) The question of the sufficiency of the petition is rightfully before this court. Lampert v. Gas Light Co., 14 Mo. App. 376; Railroad v. Swan, 120 Mo. 30. (5) The court committed reversible error in giving an instruction on behalf of plaintiff to the effect that plaintiff had a right to presume that

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Williams did his work properly. Adams v. Machine Co., 95 Mo. App. 111; Moberly v. Railroad, 98 Mo. 183; Lynch v. Railroad, 120 Mo. 420; Weller v. Railroad, 120 Mo. 635; Payne v. Railroad, 129 Mo. 405. (6) The court should have instructed the jury at defendant's request that if plaintiff knew the danger of working with Williams he assumed the risk of such danger by continuing in the employment. Flynn v. Bridge Co., 42 Mo. App. 529; Marshall v. Press Co., 69 Mo. App. 256; Watson v. Coal Co., 52 Mo. App. 366; Doyle v. Trust Co., 140 Mo. 1.

Lawrence & Lawrence and *John Burgin* for respondent.

(1) Under points I and II, appellant's brief, appellant again for the second time in this court contends that the trial court should have sustained the demurrer to the evidence "because (appellant says) plaintiff under all the evidence is not entitled to recover judgment." The same evidence to all intents and purposes in both bills of exceptions before this court is found and the same law governs the same. Adams v. Machine Co., 95 Mo. App. 116; Conroy v. Iron Works, 62 Mo. 35. (2) But the company now undertakes to contend in this court in the face of its contention heretofore that Williams was utterly unfit and glaringly so to everybody, of course to the company as well as to Adams and Adams ought not to recover. We submit that the trial court properly left these questions to the jury. Gayle v. Car Co., 177 Mo. 455. (3) Again under the law it certainly was not incumbent on Adams to stop and look before approaching this platform, or to stop, look and see that it was in a proper position and not liable to fall, and defendant's own evidence is to the effect that at all times the warehouse room was very poorly lighted and under such circumstances a very minute and critical examination would have been

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necessary to have revealed the fact. The law upon this point is declared in 95 Mo. App. 120.

BROADDUS, P. J.—This case was before this court on a former appeal and is reported in 95 Mo. App. 111, to which we refer for a statement of the facts. The case was reversed on the ground that the circuit court erred in compelling plaintiff to take a nonsuit for the reason that under the pleadings and proof he was not entitled to recover. On trial anew, plaintiff recovered and defendant appealed. The plaintiff seeks to recover damages for injuries received while he was in defendant's employ and as the result of the negligence of an incompetent and careless fellow-servant.

The defendant contends at the outset that plaintiff's petition does not state a cause of action because it fails to set out that the incompetency of Williams, the fellow-servant, was not so glaring and manifest as to threaten plaintiff with immediate injury, and, therefore, there was no excuse on his part for remaining in defendant's employ. The sufficiency of the petition was not discussed on the former appeal. The Indiana Supreme Court held that "a complaint by a servant against his master to recover for an injury caused by the negligence of a fellow-servant to be good on demurrer for want of facts must not only allege that the master knew that the fellow-servant was negligent in the discharge of his duties, but it must also show that plaintiff had no knowledge of that fact when he entered his master's service. . . ." And that "when a servant remains in his master's service after he knows . . . of the negligent habits of a fellow-servant, it it necessary in a complaint by him against the master to recover for an injury caused by the negligence of a fellow-servant to show a reasonable excuse for remaining in the service after such knowledge." [Railroad v. Stupak, 108 Ind. 111.] "Evidence tending to

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show that defective machinery was used under a promise by the master to remove the defect, held inadmissible where such promise was not pleaded." [Malm v. Thelin, 47 Neb. 686.] "In an action by a servant against his master to recover damages for personal injury caused by the defective state of the machinery or premises or materials provided by the master for the purpose of the work, it is necessary for the plaintiff to allege and prove that the danger or defect was known to the defendant and not known to the plaintiff." [Bogenschutz v. Smith, 84 Ky. 330.] A similar principle is stated in Railroad v. Doyle, 49 Tex. 190.

A different principle, however, obtains in this State. In Fisher v. Lead Co., 156 Mo. 485, it is held: "it is sufficient if the petition alleges that the defect complained of was known to the employer without also alleging that such defect was unknown to the servant." Notwithstanding, the petition in this case alleges that plaintiff was aware of the incompetency of his fellow-servant and that he notified defendant of the fact, that did not preclude him from recovery unless the danger was so apparent that a reasonably prudent person would not have longer continued in the service of defendant. If, however, the danger was so imminent that a reasonably prudent person would have abandoned the service, he was guilty of contributory negligence, which was a matter of affirmative defense to be pleaded as such. [Williams v. Railroad, 109 Mo. 475; Young v. Iron Co., 103 Mo. 324; Thorpe v. Railroad, 89 Mo. 650.] It seems to be a settled question in this State that such matters are affirmative defenses to be pleaded. The petition, we think, is sufficient.

Instruction numbered three is objected to as misleading. It is as follows: "If the jury believe from the evidence that Adams did not assist in placing the platform which fell upon him, if you find it did fall on him, or was not present at the time Williams and Imes

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set it into place, he had a right to presume that said platform had been properly placed, and it was not his duty to take particular care to inspect said platform to see if it was in a safe position before approaching the same and he was not guilty of contributory negligence merely by his failure to so inspect said platform."

We will call particular attention to some of the evidence in regard to the platform. The platform in question was that part of a harvesting machine upon which the grain falls when cut by the sickle. We quote from the former opinion: "This platform is constructed of iron, is about five feet wide by seven feet long, a few inches in thickness, and weighs about 300 pounds. These platforms were stored in this manner: one was placed at a proper distance from the wall, with the sickle bar down, and allowed to lean against the wall, each succeeding one being placed with the bar down and allowed to lean against the one preceding it. When placed in this position the back part of the platform was about six inches thicker at the top than the front of it (now the bottom), and for that reason it became necessary to place each sickle-bar about five or six inches from the preceding one in order to obtain the proper inclination to hold the platforms securely in place. It required the services of but two men to so store the platforms, but when others were to be placed on those so standing, it required the efforts of three men to do the work. Just before the happening of the injury on which this action is based, the plaintiff here, together with Williams and Imes, had been engaged in storing the platforms, the two latter passing them up to plaintiff who had been placing them on top of the row; and finally, when as many had been so placed as the plaintiff thought proper, he went downstairs, leaving Williams and Imes to finish standing up a few that remained. After they had done this and started away from the platforms, Imes noticed that they had

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been placed with the sickle bars too close together, so that the last one at the end of the row was standing in a perpendicular position instead of being properly inclined toward that back of it. Imes thereupon called Williams' attention to its position, asking him if it would not fall, to which Williams replied that it was just as he wanted it—to leave it alone.'' It was this platform that soon afterwards fell upon plaintiff and injured him while he was doing other work in its proximity.

The criticism of the instruction is that under the circumstances it was error to instruct the jury that plaintiff had the right to presume that the platform was properly placed and that he was not required to take particular care to inspect it to see if it was in a safe position before he approached it. The criticism is based upon the fact that plaintiff knew that Williams had assisted in placing the platform and that he knew he was an incompetent and negligent workman.

The presumption is that every one exercises ordinary care in the absence of evidence to the contrary. But where there is evidence to remove the presumption, a reference to the latter is usually to be avoided. [Moberly v. Railroad, 98 Mo. 183.] In Lynch v. Railroad, 112 Mo. 420, the court held a similar instruction was wrong. In that case a boy was killed by a street car drawn by mules. The law required that the company should place bells on their mules so as to give warning to persons using the streets. The company in that instance failed to comply with the law in that respect and that fact was relied upon for recovery. It was shown that the boy had every opportunity to know that the mules did not have bells attached to them. It was shown that he lived within one block of the car track; that he had often been on the street; that the street was clear of incumbrances at the time; that he crossed the street not over fifteen feet in front of the car; that the mules were moving at a walk; that he

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was not deaf; and that by the exercise of the slightest prudence he could have seen the car and known that there were no bells on the mules. "A presumption that every one will obey the law rests upon the fact that dutiful citizens do obey it. The presumption is at once rebutted when it appears that the law is habitually violated." [Weller v. Railroad, 120 Mo. 635; Payne v. Railroad, 129 Mo. 405.]

The argument of defendant is that as plaintiff had full knowledge of the incompetency and negligent conduct of Williams, he had no right to presume that he had done his work properly. And we are not prepared, under the authorities, to deny its position. The plaintiff testified that Williams, the fellow-servant, was working for defendant for several years before he received the injury of which he complains. The injury was inflicted in 1898. In 1895 plaintiff knew that Williams was an incompetent and "very reckless" workman, and that he informed defendant's agent of that fact. Prior to this time he had been injured by Williams while the two were unloading some mowers from a car. And at one time he told the defendant's agent he would not have Williams to help do certain work. He repeatedly told the agent in charge that Williams was incompetent and negligent, but the agent made no promise to discharge him. He further stated that he avoided working with Williams if it was possible to do so. Plaintiff having such complete knowledge of the incompetency and recklessness of Williams, had no right to indulge in the presumption that he had properly set up said platforms, and it was a serious error to instruct the jury that he had the right to rely on such presumption. It gave him an advantage in the trial to which he was by no means entitled.

Other objections to plaintiff's instructions and complaint of errors in failing to give certain instructions for the defendant are not well founded.

But the burden of defendant's contention is that

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under all the evidence plaintiff was not entitled to recover, and that its demurrer to the evidence should have been sustained. The general rule is that the servant does not assume the risks arising from the incompetency and recklessness of a fellow-servant, unless they are so glaring and palpable that a person of ordinary prudence would no longer continue in the service of the master, *which is a question for the jury.* The contention of defendant, however, is that the uncontradicted evidence shows that the danger to plaintiff was so open and glaring that it could not have escaped the observation of an ordinarily prudent man, or the notice of one of plaintiff's experience, and the plaintiff, without any assurance from the master, continued the work. Therefore, that it was a matter of law for the court, and the jury should have been instructed to find for defendant. In the original opinion in this case we held that plaintiff, under the facts, was entitled to go to the jury on his evidence. Upon a review of the case, while not impressed with the strength of plaintiff's showing, under the authorities we feel constrained to uphold the finding.

In Francis v. Railroad, 127 Mo. 658, the rule announced is that knowledge of plaintiff that a fellow-servant was incompetent, and that he had so reported him to the master, will not preclude a recovery for damages resulting from the negligence of such fellow-servant, if the danger in working with him was not so obvious that an ordinarily prudent man would refuse to do so, which is a question for the jury. And such was the holding in Williams v. Railroad, 109 Mo. 475. Both of these cases follow the decision in Railroad v. Mares, 123 U. S. 710. Hamman v. Coal Co., 156 Mo. 232, was a mining case where the deceased, an experienced miner, must have known that the condition of the roof of the mine would cause it to fall at some time. It was there held: "Whether or not deceased assumed the risk of the roof falling upon and injuring him was,

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under the circumstances, for the determination of the jury." The court applied the rule as expressed in Shearman & Redfield on Negl. (5 Ed.), secs. 211 and 212. In the latter case the rule seems to have been carried to its limit.

In the case at bar, plaintiff was not injured while engaged at work with the incompetent fellow-servant, but secondarily as the result of the carelessness of such servant in placing the platforms in an insecure condition. It was, therefore, a question for the jury to determine under proper instructions whether the act of plaintiff, under the circumstances, in approaching said platforms placed by Williams was such contributory negligence as would preclude him from recovery. It was for the jury to say whether or not he was negligent in approaching said platforms without looking to see whether or not they were securely placed. But as the court assumed to tell the jury as a matter of law that he had the right to presume that they were securely placed, it was equivalent on that question to instructing them to find for the plaintiff, which was the pivotal point in the cause.

For the reasons given the case is reversed and remanded. All concur.

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H. D. FAULKNER et al., Appellants, v. T. O. BRIDGET et al., Respondents.

Kansas City Court of Appeals, March 27, 1905.

MECHANICS' LIENS: Notice of: Immaterial Date: Statutory Construction. A recitation in a notice of intention to file a mechanic's lien that it will be filed on a given date, which is within the ten days, will not vitiate the lien, which is not filed until the expiration of the ten days, since such date is not required by the statutes and is therefore immaterial and mere surplusage, especially where no injury has occurred to the landowner by reason thereof,—and since the statute is to be liberally construed to carry out its beneficent object.

Appeal from Jasper Circuit Court.—*Hon. Hugh Dabbs*, Judge.

REVERSED AND REMANDED.

McReynolds & Halliburton for appellants.

(1) The notice in this case was a substantial compliance with the statute. It was served ten days before the lien was filed and contained all that the statute required, and fixing the time for filing of lien was surplusage, and did not invalidate the lien or notice. R. S. 1899, sec. 4221; Hahn v. Dieckes, 37 Mo. 574; State v. Watson, 141 Mo. 338; State v. Napper, 141 Mo. 401; State v. Wilson, 143 Mo. 334; State v. Miller, 156 Mo. 76; State v. Walker, 167 Mo. 366; State v. Major, 81 Mo. App. 289. (2) The court erred in holding that the notice of intention to file the lien, offered in evidence, was insufficient. The notice was sufficient to put the owner on his guard. Construction Co. v. Jones, 60 Mo. App. 1; Henry v. Pitt, 87 Mo. 237; Putnam v. Ross, 46 Mo. 338; Miller v. Hoffman, 26 Mo. App. 202; Steinman v. Strimple, 29 Mo. App. 478; Dewitt v.

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Smith, 63 Mo. 266; Bambrick v. Assn., 53 Mo. App. 240; Shaw v. Bryan, 39 Mo. App. 523; Grace v. Nisbet, 109 Mo. 19; Phillips On Mechanics' Liens, sec. 16. (3) By striking out of the notice or treating as surplusage the words "on the fifth day of March, 1904," you have a notice in perfect compliance with the statute. And there is nothing to show that the Ishpeming Mining Company was injured by those words. So they will be rejected as surplusage. 10 Am. and Eng. Ency. Law, pages 552 to 557; State v. Schloss, 93 Mo. 361; Bambrick v. King, 59 Mo. App. 284. (4) Statutes giving lien for materials are remedial in their nature, and should be given a liberal construction so as to carry out their just and beneficent objects. Stone Co. v. Gray, 114 Mo. 497; Brick Co. v. McTaggart Co., 76 Mo. App. 347. (5) The notice is no part of the lien. All that is necessary is one sufficient to inform the owner that the claimant holds a claim against the improvement, setting forth the amount and from whom due. Bambrick v. King, 59 Mo. App. 286.

Thomas W. Hackney for respondent.

(1) It was the duty of the plaintiffs to give the owner notice of their intention to file a lien ten days before the filing of the lien. R. S. 1899, sec. 4221. (2) A lien filed without such notice is void. Even though the owner has actual knowledge of the claim, this is not a substitute for the statutory notice. 20 Am. and Eng. Ency. Law (2 Ed.), 377. (3) While it was not necessary for the plaintiffs to state in their notice the day on which they intended to file their lien, yet when they did specify the day and this was less than ten days from the date of service and the owner of the property was misled into the belief that the lien would be filed on the specified day, and in consequence took no steps to protect itself against the filing of the lien, then the date specified became very material and

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cannot be rejected as surplusage; and the notice was thereby rendered void. 20 Am. and Eng. Ency. Law (2 Ed.), 380; Lindsay v. Davis, 30 Mo. 412; Jackson v. Hardin, 83 Mo. 186; Carthage v. Badgley, 73 Mo. App. 123; Hardware Co. v. Hardware Co., 75 Mo. App. 518.

BROADDUS, P. J.—This suit is to enforce a mechanic's lien against a mining plant belonging to the respondent company for a balance due from defendant, T. O. Bridget, the contractor. The judgment was in favor of the defendant company, from which plaintiffs appealed.

On February 26, 1904, the plaintiffs served a notice in writing on defendant company stating that they had a claim against the property for a balance due from the said contractor, Bridget, of $162.18, and that they would file a mechanic's lien on the property in the circuit clerk's office on the 5th day of March, 1904. This notice was not filed until the 7th of March. It will be seen that the time fixed for filing the lien in the notice was not ten days' notice as required by the statute. The court found from the evidence that the notice of plaintiffs' intention to file a mechanic's lien served on defendant company February 26, 1904, and notifying said company that the lien would be filed on the 5th of March, was less than ten days; and that said company was misled as to the time of filing said lien, and for that reason deemed the notice invalid and on that account took no steps to prevent the filing of the same; for which reason the court decided for respondents. The only question in this case is whether the notice was sufficient. Section 4221, Revised Statutes 1899, requires that the person who wishes to avail himself of the benefits of the mechanic's lien law "shall give ten days' notice before the filing of the lien." It will be seen that plaintiffs were not required to fix any particular day for the filing of their lien, but that notice should be given ten days before the

filing thereof. The respondents insist that notwithstanding the statute does not require the lienor to fix a day on which he intends to file his lien, yet if he does so he is concluded by it; and that as the time fixed for such filing in the notice was not ten days from the time of service thereof, it did not comply with the statute and it was therefore nugatory.

In Lindsay v. Davis, 30 Mo. 412, the second count of the petition averred that the animals purchased by plaintiff from defendant were unsound and the defendant knew it. Then there was a further allegation that the disease constituting the unsoundness was glanders. The court held that the last allegation was surplusage, but that plaintiff was bound by it; and that unnecessary averment, if not immaterial or impertinent, when made must be proved. The court by inference draws the distinction between an unnecessary, but material, statement and a statement that is unnecessary and immaterial.

It is, of course, conceded that it was unnecessary for plaintiffs to fix any particular day in their notice upon which they would file their lien. A material matter we understand to be something essential, and it is so defined. See Webster's International Dictionary. And "immaterial" is defined by the same authority as "unimportant; without weight or significance." The case just referred to is cited by respondents to sustain their contention. The distinction between unnecessary and material allegations and immaterial statements does not exist, as it seems to us that in law whatever is unnecessary is neither essential nor material. Of course, we are bound by the decision as far as it affects this case. But we are of the opinion that the statement of the notice that a lien would be filed on a certain day was not only unnecessary but also immaterial. The statute did not require plaintiffs to fix any day on which they would file their lien, only that they should give ten days' notice to the respondents before

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they did so file it; therefore, it was not material—it was not essential. And we do not see how respondent company could have been misled. If the lien had been filed on the day fixed, it would have been invalid. That was the law, and respondent must be held to a knowledge of the law. It could only have been misled by the notice to the effect that plaintiff's lien would be invalid; and that would not entitle it to the protection of the courts. It is true, mere knowledge that plantiffs intended to file a lien would not bind defendant company's property; it was necessary that it should have ten days' notice of the intended filing. There was no evidence that defendant was misled by the notice and paid out money to the contractor which it would otherwise have applied to payment of plaintiff's demand. One of defendant's witnesses stated, it is true, that "On considering the notice and seeing the lien was to be filed on March the 5th when notice had not been served until the 26th (presumably 26th of February) the company took no steps to prevent the filing of the lien." Defendant had no right to take advantage of the surplus statement of the notice, which could have been and was in fact filed within the time provided by law. We think it good to hold that under the circumstances as the immaterial statement in fact caused no injury to the defendant, it ought to be disregarded. The statute should be liberally construed so as to carry out its beneficent object. [Dugan Cut Stone Co. v. Gray, 114 Mo. 497; Hydraulic Press Brick Co. v. McTaggart, 76 Mo. App. 347.]

The cause is reversed and remanded. All concur.

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ANDREW ZONGKER, by next friend, Respondent, v. PEOPLE'S UNION MERCANTILE COMPANY, Appellant.

Kansas City Court of Appeals, March 27, 1905.

1. **TRIAL PRACTICE: Pleading: Reply: Waiver.** Though there be no reply, yet if the trial and evidence proceed on the theory that there is one, the omission is waived.

2. **PLEADING: Instruction: Variance.** The petition and the instructions based thereon are examined and held to coincide and not to constitute a variance.

3. **NEGLIGENCE: Elevator: Evidence: Master and Servant.** The evidence relating to the condition of an elevator is held to show negligence, and that the injury resulting therefrom did come within the assumption of risk by the servant, and the facts did not warrant the conclusion that the servant was guilty of contributory negligence, which question was properly submitted to the jury.

4. **PARENT AND CHILD: Emancipation: Evidence: Jury.** No formal act is required to effect the manumission of a minor child, and although the intention must be clearly established it may be inferred from conduct alone and should be submitted to the jury.

5. **——: ——: Prochein Ami: Earnings.** Where a parent is next friend to a son in an action for personal injury and claiming his lost earnings, the former is presumed to know the contents of the pleadings and to sanction the same and must be held to voluntarily surrender his rights to such earnings.

6. **DAMAGES: Loss of Earnings: Pleading.** Held, that both the allegation and proof in the record are sufficient to support a recovery of lost earnings.

Appeal from Jackson Circuit Court.—*Hon. Andrew F. Evans*, Judge.

AFFIRMED.

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J. N. & A. C. Southern for appellant.

(1) The court erred in giving the long instruction asked by plaintiff, designating the negligence charged against defendant as pulling upon the cable with unusual force so that it suddenly became loose and moved causing plaintiff to fall, etc. The language used presented an issue not raised in the pleadings, an issue not constituting an allegation of negligence and if supported by the testimony, an issue that would not sustain a verdict for plaintiff. Pryor v. Railway, 85 Mo. App. 378; Jacquin v. Cable Co., 57 Mo. App. 331; Ramey v. Railroad, 157 Mo. 506. (2) Plaintiff's instruction numbered 1 was erroneous in that it was so general as to permit the jury to find for plaintiff on other grounds than those set forth in the petition. Chitty v. Railroad, 148 Mo. 64; Edwards v. Railroad, 79 Mo. App. 257; Colliott v. Mfg. Co., 71 Mo. App. 163; Milligan v. Railroad, 79 Mo. App. 393; Wilmott v. Railroad, 106 Mo. 535; Estes v. Shoe Co., 155 Mo. 573; Hoepper v. Hotel Co., 142 Mo. 378; Bradley v. Railroad, 138 Mo. 293; Tailor Co. v. Smith, 52 Mo. App. 351; Achlereth v. Railway, 96 Mo. 509; Jacquin v. Cable Co., 57 Mo. App. 320; Dahlstrom v. Railroad, 96 Mo. 99; Mfg. Co. v. School Dist., 54 Mo. App. 171; Mound City v. Conlon, 92 Mo. 292; Wilmott v. Railway, 106 Mo. 535. (3) The court in giving the instruction numbered 3 for plaintiff erred in submitting to the jury the question of plaintiff's emancipation by his mother as affecting an increase of damages to be allowed in his favor, by reason of time he might hereafter lose from work on account of his alleged injuries. The question was not sufficiently raised in time or in terms by the pleadings nor the proposition sought to be contained in it sustained by the testimony. Philpot v. Railway, 85 Mo. 164; Soldanels v. Railway 23 Mo. App. 521;

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Schouler on Domestic Relations; Wood on Master and Servant. If the father be dead, the wages belong to the mother. Dooley v. Railway, 45 Mo. App. 108. (4) The next friend is not the agent of the infant, but derives his authority from the court which appoints him. Hence, he is not estopped by the proceedings in a cause where he acts as next friend. He is an officer of this court and therefore is not estopped by the judgment. Raming v. Railway, 157 Mo. 491. (5) Damages for the loss of a child's services cannot be recovered without evidence tending to show the probable value of such services from the time of the injury to the child's majority. Dunn v. Railway, 21 Mo. App. 206. (6) Here no proof of damages of future loss of time was made. Hence, the instruction was error also in this particular. (7) The court erred in refusing to sustain defendant's demurrer to the evidence at the conclusion of plaintiff's testimony and at the close of the case in refusing defendant's instruction marked "D," both to the effect that if plaintiff knew of the defects of the elevator and voluntarily undertook to operate it and was injured by the said defects he could not recover. Roddy v. Railway, 104 Mo. 251; Price v. Railroad, 77 Mo. 511; Porter v. Railroad, 71 Mo. 67; Dimit v. Railroad, 50 Mo. 302; Roberts v. Tel. Co., 166 Mo. 379; Steinhauser v. Spraul, 127 Mo. 562; Nugent v. Milling Co., 131 Mo. 245; 2 Thompson on Neg., 1008; Flood v. Tel. Co., 131 N. Y. 603.

Flournoy & Flournoy for respondent.

(1) By going to trial upon the issues involved and tried, appellant waived the error, if any, of respondent's failure to file a reply to appellant's answer. Nelson v. Wallace, 48 Mo. App. 193; Holke v. Herman, 87 Mo. App. 125. (2) If the state of appellant's record does not preclude it from making its point as to contributory negligence, then we say that neither the

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defects in the elevator, nor the knowledge of respondent, were such as to charge respondent with contributory negligence. Wendler v. Fur. Co., 165 Mo. 527; Robbins v. Min. Co., 105 Mo. App. 78, 79 S. W. 480; Weston v. Min. Co., 105 Mo. App. 702, 78 S. W. 1044; Dean v. Woodenware Works, 80 S. W. 292; Carter v. Baldwin, 81 S. W. 204; Cole v. Transit Co., 183 Mo. 81, 81 S. W. 1138. (3) A parent can emancipate his or her minor child so as to entitle the child to recover for loss of time, past and future, in an action for personal injuries, and such emancipation may be shown by direct evidence or implied from circumstances. Dieker v. Hess, 54 Mo. 246; The Etna, 1 Ware (U. S.) 462; Waddell v. Coggshall, 2 Metc. (Mass) 89; Abbott v. Converse, 4 Allen 538; McCarthy v. Railway, 148 Mass. 550; Bobo v. Bryson, 21 Ark. 387; Fanhurst v. Lewis, 23 Ark. 435; Wheeler v. Railway, 31 Kan. 640; Campbell v. Campbell, 11 N. J. Eq. 268; Burdsall v. Waggoner, 4 Colo. 261; Shortell v. Young, 23 Neb. 408; Dick v. Grissom, 1 Freeman Ch. (Miss.) 428; Judd v. Ballard, 66 Vt. 668; Scott v. White, 71 Ill. 287; Angler v. Badgley, 29 Ill. App. 336; Iron Works v. Duncan, 2 Ind. App. 264; Wright v. Dean, 79 Ind. 407. (4) If no emancipation had been alleged or proven, the respondent's mother would be estopped from bringing any action against the appellant for the loss of her son's services because she brought this suit as his next friend and testified in the case. McCarthy v. Railway, 148 Mass. 550; Railway Company v. Davis, 58 S. W. 698, 60 S. W. 114; Scott v. White, 71 Ill. 287; Angler v. Badgley, 29 Ill. App. 336; Ables v. Bransfield, 19 Kas. 16; Baker v. Railway, 91 Mich. 298, 51 N. W. 897.

JOHNSON, J.—Action for damages resulting from personal injuries. Plaintiff recovered judgment for four hundred and eighty-five dollars and defendant appealed. The answer contained a plea of con-

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tributory negligence. No reply was filed but it appears the case was tried upon the theory that plaintiff's negligence, if any, was in issue. The error involved in this omission, therefore, was waived. [Nelson v. Wallace, 48 Mo. App. 193; Holke v. Herman, 87 Mo. App. 125.]

Plaintiff, a boy 17 years of age, was at the time of his injury employed in common labor by defendant in and about its store building in Independence. He was engaged in using, under defendant's directions, a freight elevator maintained in the building. After entering upon the elevator, the floor of which was at the time some three feet below the floor of the building from which he entered, plaintiff pulled in the usual way upon the cable provided for putting it in motion; no response following this act, he applied greater force in a pull upon the cable, whereupon it suddenly loosened and the elevator started to ascend. Owing to this unexpected result plaintiff was thrown in a position that his left leg was caught between the floor of the elevator and that of the building, resulting in the fracture of his knee cap.

The negligence charged in the petition is contained in the following allegations: "Said elevator was out of repair and in an unsafe and defective condition in this: that its floor would not stand on a level with any of the floors of said building when said elevator was stopped at any of said floors, but would sink about two feet below the same, and said cable would often catch and become fast in the machinery so as not to properly respond to the usual and proper force necessary to move said elevator. . . . That at said time, owing to said defective condition of said elevator, the floor of same was standing about two feet below the floor of said building and said cable was caught or fast in the machinery of said elevator. . . . That after plaintiff in obedience to said order had placed said material upon said elevator, and had gotten upon it, he found said cable fast as aforesaid, and while attempting to

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manipulate the same so as to move said elevator, said cable, because of said defective condition of said elevator, suddenly became loose and caused said elevator to suddenly and violently start, causing plaintiff to fall,'' etc.

It is contended the first instruction given on behalf of plaintiff presented issues of fact different from those specified in the petition. The variance claimed is contained in this part of the instruction; ''and that on said date when said Zongker undertook to use said elevator, said cable had become caught and was fast, owing to said defective condition of said elevator (if you find the same was defective) so that it became necessary for said Zongker to pull upon said cable and said elevator and that while he was so pulling, said cable suddenly became loose and moved causing him to fall and said elevator to move and to catch his knee.''

It is urged that plaintiff's act in starting the elevator, described in the petition as an attempt ''to manipulate the cable to move the elevator,'' is essentially different from that submitted in the instruction in the words ''and it became necessary for Zongker to pull upon said cable with unusual force.''

The gist of the complaint made in the petition is that the elevator was so out of repair the operating cable would catch, become fast in the machinery, and on account thereof fail to respond to usual and proper force, and was in such condition at the time plaintiff attempted to start it. In the light of the facts averred, a proper interpretation of the words ''attempting to manipulate the cable'' would include the act of pulling upon it with unusual force. Doutless the pleader in employing the word ''manipulate''—which means to handle; to treat, work or operate with the hands—meant to include both acts of plaintiff in his efforts to move the elevator, the ordinary pull first applied and the more forcible one which followed. In this view,

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it is clear the issues submitted in the instruction coincide with the facts alleged.

Defendant's abstract of the record does not contain the evidence offered by it at the trial. From that introduced by plaintiff it appears defendant was negligent in a marked degree. The elevator was moved by water power. Its operating gear was contained in an enclosed receptacle which was permitted to become filled with mud, scraps of iron and other material to such an extent that the wheels became clogged and moved with difficulty. This condition was known to defendant, one of whose officers had made weak and abortive attempts to repair it. Under such facts, there can be no question of assumed risk in the case. [Pauck v. Beef, etc., Co., 159 Mo. 467; Curtis v. McNair, 173 Mo. 280; Cole v. Transit Co., 183 Mo. 81, 81 S. W. 1142; Smith v. Coal Co., 75 Mo. App. 177; Settle v. Railway, 127 Mo. 336; Huhn v. Railway, 92 Mo. 440; Cardwell v. Railway, 90 Mo. App. 31.]

Nor do they warrant the conclusion that plaintiff, as a matter of law, should be held guilty of contributory negligence. That question was one for the jury and was submitted in properly drawn instructions. See authorities last cited.

The elevator had been out of repair in the manner described for some time. It was a common thing for the cable to catch, and those operating it had been accustomed to pull vigorously when they found it fast. Plaintiff, a mere youth, followed the example of others. No imminent danger was threatened and there is no evidence in the record before us which points to any want of due care in plaintiff. He fell because of the unexpected suddenness and violence of the loosening of the cable, and this was the direct result of the defective condition of the machinery.

Further, it is said that error was committed in permitting plaintiff to recover for loss of earnings. One ground of complaint is based upon the fact of his

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minority. The mother of plaintiff appeared as next friend in this action. The father is dead and the young man lived with his mother. During the trial an amendment of the petition was permitted to include the charge that plaintiff worked for himself with his mother's consent. The jury was required by plaintiff's instructions to find that he had been emancipated by his mother as a condition to allowing him damages for loss of earnings. Plaintiff testified that with the knowledge and consent of his mother he had been collecting his wages and using them without interference from her.

No formal act, such as formerly attended the manumission of a slave, is required to effectuate the release of a parent's right to the earnings of his minor child. Parental affection frequently suggests giving to the son the fruits of his labor as an encouragement to industry and thrift. The idea of a formal emancipation is repugnant to the natural love existing between parent and child, and, happily, but rarely occurs to the mind of either. The law does not require persons standing in this close relation to deal at arm's length. The intention of the parent to relinquish his claim to the earnings of his child is all that is necessary, and although such intention must be clearly established, it may be inferred from conduct alone.

In addition to the fact that plaintiff was suffered to collect his wages and appropriate them to his own use, his mother acted as his next friend, was present at the trial, testified as a witness, and in every way aided her son in his effort to recover his lost earnings. It may be conceded that a *prochein ami* is not a party to the cause, acts as an officer of the court, is a species of attorney, and is not estopped by the fact alone of such appearance from afterwards asserting against defendant an individual demand of his own arising from the same tort that furnishes a basis for the minor plaintiff's cause of action. [Raming v. Railroad, 157

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Mo. 490.] He is presumed, however, to be familiar with the contents of pleadings filed in behalf of plaintiff and to sanction and direct the prosecution of the claims made therein, and when he stands by without objection and permits a claim for lost earnings to be pressed on behalf of the infant plaintiff and recovery of them follows evidence showing emancipation, such next friend must be held to have surrendered voluntarily his right to such earnings.

It was proper to submit to the jury the question of plaintiff's emancipation. [Dierker v. Hess, 54 Mo. 246; Ream v. Watkins, 27 Mo. 519; In re Dunavant, 96 Fed. 542; Abeles v. Bransfield, 19 Kan. 16; Baker v. Railroad, 91 Mich. 298; Scott v. White, 71 Ill. 287; McCarthy v. Railroad, 148 Mass. 550; Shortel v. Young, 23 Neb. 408; 1 Parsons on Contracts, 352; Schouler on Domestic Relations, sec. 267 et seq.]

Another objection urged is alleged to be the lack of evidence respecting the value of plaintiff's time. Loss of earnings is a kind of damage which must be specially pleaded and proven. [Wilbur v. Railroad, — Mo. App. —; Mellor v. Railroad, 105 Mo. 462; Slaughter v. Railroad, 116 Mo. 274.] It is averred in the petition that plaintiff "has been wholly incapacitated from performing any work since said date and has, therefore, lost much time and will hereafter lose much time from work." Plaintiff testified that at the time of his injury he was receiving one dollar and fifty cents per day for his work. Up to the time of the trial of the cause he had been unable because of his injuries to perform any labor. Both allegation and proof were sufficient to support a recovery. [Wilbur v. Railroad, supra; Gurley v. Railroad, 122 Mo. 151; Mabrey v. Gravel Road Co., 92 Mo. App. 602; Gerdes v. Foundry Co., 124 Mo. 360; Smith v. Railroad, 119 Mo. 253.]

Judgment is affirmed. All concur.

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SALLIE A. BALLARD, Respondent, v. KANSAS CITY, Appellant.

Kansas City Court of Appeals, March 27, 1905.

1. **DAMAGES: Personal Injury: Permanency: Evidence.** *Held,* direct evidence was sufficient to send to the jury the question of the permanency of plaintiff's injuries without resorting to expert testimony.

2. ———: ———: ———: **Reasonable Certainty: Interpretation of Evidence.** Before a claim for permanent injury can go to the jury there should be evidence tending to prove such injury to a reasonable certainty but not to an absolute certainty; and the expression "in all likelihood" used by an expert witness should be treated as equivalent of reasonable certainty, since in the interpretation of the language employed by witnesses the main object is not to draw fine distinctions based on accurate definitions of words, but to ascertain the real idea intended to be expressed.

3. ———: ———: ———: **Instruction.** The expression "may have suffered" in an instruction is descriptive of completed action and equivalent to "has suffered," and is not subject to the objection that it licenses the jury to revel in mere probabilities, but it confines to the investigation of an existing fact.

4. ———: ———: ———: ———. Where there was a conflict in the evidence as to the permanency of plaintiff's injury, and the jury was free to reject such claim entirely, an instruction authorizing a recovery for such bodily pain and mental anguish as plaintiff "may suffer by reason of her injury in the future, if any," was erroneous, as not limited to the bounds of "reasonable probability."

Appeal from Jackson Circuit Court.—*Hon. James Gibson,* Judge.

Reversed and remanded.

R. J. Ingraham, City Counselor, and *L. E. Durham* for appellant.

(1) It was reversible error for the trial court to instruct the jury in this case that they should assess

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damages in favor of plaintiff "for any pain of body and mental anguish that she may suffer . . . in the future . . . and for any permanent injuries she may have suffered." Defendant's evidence showed positively there was no permanent injury whatever. Albin v. Railroad, 103 Mo. App. 318; Batten v. Transit Co., 102 Mo. App. 285; Bigelow v. Railroad, 48 Mo. App. 367; Caplin v. Transit Co., — Mo. App. —; Schwend v. Transit Co., 105 Mo. App. 534, 80 S. W. 40; Girdes v. Iron Co., 124 Mo. 361; Smiley v. Railroad, 160 Mo. 629. (2) Plaintiff's first instruction referring specifically to the facts in the case and purporting to present plaintiff's case to the jury, should have required the jury to find that the sidewalk in question described in the instruction, was not reasonably safe for travel at the time of the accident. Such finding is essential to plaintiff's rightful recovery.

Hamner, Hamner & Calvin for respondent. Filed an extended argument.

JOHNSON, J.—Action for damages resulting from personal injuries sustained by plaintiff in consequence of the negligence of defendant in maintaining in a defective and out-of-repair condition a board sidewalk on Agnes avenue between Eighteenth and Nineteenth streets in defendant city. Plaintiff, while walking thereon in May, 1900, tripped over a loose board and fell, from which she suffered various bodily injuries. The trial resulted in a judgment for her in the sum of one thousand dollars.

Defendant complains of the submission to the jury of the permanent character of the injuries received as an element of damages and asserts the evidence thereof is insufficient to support the instruction which presented that issue.

From plaintiff's evidence it appears her right collar bone was broken and in healing had failed to unite

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properly. The trial occurred in May, 1903, three years after the accident, and at that time she was still suffering a practical disablement of her right arm. She was then fifty years of age and in poor physical condition, being, as the physicians described her, "an anaemic." When upon the witness stand she was interrogated by her counsel relative to existing indications of injury and said: "There is a protuberance on the collar bone and the leaders in my shoulder are very much shrunken. Anyone can see it. It lets my shoulder droop over—that is, this shoulder droops front instead of being straight as the other side is. . . . The leaders are all shrunken and my arm is so weak I cannot raise it scarcely at all." Plaintiff also testified that she had at all times suffered much pain and had been unable to do her work. In all of her statements relative to her condition, pain and suffering and inability to use her right arm, as well as those describing the influence produced by her injuries upon her general health, she was corroborated by other witnesses. Two doctors also were introduced as witnesses in her behalf. One of them, Dr. Fulton, said in answer to an inquiry about her collar bone: "It has been broken right close to the shoulder joint. There is union there but it is not a good union. There is unquestionably a stiffness when you raise that arm. Sometimes we say that the patient complains of pain and that there is no way you can tell whether there is pain or not. This is not true of her. There is a severe pain when she wrenches that arm decidedly. I wrenched it pretty hard right now to detect whether there was any, and what kind of union there was in that portion of the shoulder bone. Well, there is union, poor union, very poor. There is considerable ankylosis (stiffening) in that portion of the joint. . . . The conditions are there plainly enough." On cross-examination: "Well, the shoulder in this kind of a case—where you don't get the bones exactly in apposition for some cause—

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in this case the bones are overlapped—the shoulder droops forward." And on redirect examination: "If you put the ends of the bones exactly as they were when the bones were broken, exactly—if it can be done —you would expect no pain whatever. The pain is only caused by a slight dislocation—a slight elevation or depression, either sideways or any other way; that is what causes pain: by pressure on the nerve. It is sometimes pretty hard to get them in apposition. You cannot always get them in perfect apposition, but when they are in perfect apposition there is no pain. Where they are not, there is a great deal of pain."

The other expert, Dr. Jones, found the same conditions as those testified to by Dr. Fulton. He further testified as follows: Q. "Now, I will ask you if her injury, in your opinion, is permanent?" A. "Well, I think the results of the injury, in all likelihood, are permanent." It is said the word "likelihood" used by this witness falls short of including within the scope of its meaning that degree of certainty which has been held elemental to the right to recover on account of the permanency of injuries sustained. It is not required of the plaintiff to prove, nor of the jury to believe in, the absolute certainty of enduring condition or result. It is essential to show the existence of such facts as a reasonable certainty; in other words, the very highest degree of probability must appear, but to compel the plaintiff to go beyond this, would be unreasonable— and doubtless would work injustice in many cases wherein the fact of permanency, though real, cannot be ascertained with positive certitude.

"In all likelihood" should be treated as the equivalent of reasonable certainty. Both expressions describe the same degree of probability—the highest. We may add that, in the interpretation of language employed by witnesses, the main object is not to draw fine distinctions based upon accurate definitions of words, but to ascertain the real idea intended to be expressed.

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Upon a careful examination of all of the testimony of this witness, no room exists even for a doubt that he intended to be understood as saying that in his opinion plaintiff's injuries are permanent.

The nature of the injuries and plaintiff's very obvious condition at the time of trial, as disclosed by her evidence, were sufficient in themselves, without the opinion of experts, to permit the jury to pass upon the question of permanency. The broken ends of the bone had failed to join, but overlapped; the shoulder drooped forward; the ligaments were shrunken; the muscles atrophied; the arm reduced in size and bereft of strength, all of this in a person fifty years old and of delicate constitution. No need to resort to conjecture or speculation in entertaining the belief that she always will have a bad shoulder and arm.

Plaintiff's fifth instruction is as follows: "If you find for the plaintiff you will assess her damages at such sum as you believe will be a just and reasonable compensation for any pain of body and mental anguish suffered by plaintiff, if any, and for any pain of body and mental angush *that she may suffer* by reason thereof in the future, if any, and for any permanent injuries plaintiff *may have suffered* by reason thereof, if any, in all not exceeding fifteen thousand dollars."

The extent of plaintiff's injuries, the pain and suffering endured, and the future consequences to be expected, were all facts in issue under the pleadings and evidence. Defendant introduced evidence contradicting that of plaintiff upon these facts. Defendant assails the instruction quoted on the ground that both with respect to future pain and permanent injury, it fails to confine the consideration of the jury within the limits of reasonable certainty, but permits them to revel in the field of mere probability, and even of conjecture—to award damages for purely contingent or imaginary future results. So far as this criticism is applied to the issue of permanent injury, it is without

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merit. "May have suffered" is a form of the verb "to suffer" descriptive of completed action, and so far as tense is concerned is the equivalent of the past tense, indicative mode, "has suffered." This latter form of the verb may be substituted for that used without change of meaning. As permanency is a fact existing in the present, the result of completed action and independent of future happening or contingency for its continuation, it is apparent no speculative future event could be considered by the jury under the form of expression employed. A present fact was dealt with and the jury was restricted to the consideration of present conditions.

But that portion of the instruction relating to future pain is subject to serious objection. As to such damages the jury was directed to include those arising "from any pain of body and mental anguish that she may suffer." Considering the conflict in the evidence, the jury, under the instructions given, was free to reject the claim of permanent injury and yet could have found the injuries to be such that future pain would follow. Such pain not being dependent upon a permanent condition of injury is a separate and independent element of damage, and was so treated in the instruction; therefore, the language employed in submitting the issue of permanent injury can not be used to limit the license given the jury to indulge in speculation in awarding damages for future pain. Damages that *may be suffered* include those that *will result*, and far more besides—the legion, traceable perhaps to the original injury, that may spring into being as the result of unanticipated future events. The uncertainty of such happenings furnishes the reason for the rule which prohibits their consideration as an element of damage.

In Wilbur v. Railroad, not yet reported, we held: "Consequences which are contingent, speculative or merely possible are not to be considered. To justify a recovery for apprehended future consequences, there

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must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury." In Schwend v. Transit Co., 105 Mo. App. 534, 80 S. W. 40, decided by our sister court, the use in an instruction of the identical words under consideration was condemned. The court said: "Pecuniary compensation is not restricted to the prospective injuries and pain and anguish which, from the evidence, will reasonably result from the injuries, but the award of damages is to be measured as well by those she may suffer in the future from the effects of such injuries. The boundary of reasonable certainty is ignored and the jury permitted under such instructions to give free rein to their respective imaginations and individual conjectures without lawful limits of reasonable certitude and probability clearly defined to guide the jury in its deliberation and finding." The case of Baker v. Independence, 93 Mo. App. 165, much relied upon by plaintiff, sustains the views herein expressed. The use of the words here employed was criticised and the instruction in which they appeared saved from condemnation only by the presence therein of other words prohibiting the consideration by the jury of future probabilities. In Albin v. Railroad, 103 Mo. App. 308, this court, speaking through Judge Broaddus, said: "The rule is that it is not the possible or probable future pain and anguish which *may* result from injury that will justify an award of damages, but only such damages which from the evidence will reasonably result in the future." Other authorities sustaining this rule are as follows: Bigelow v. Railroad, 48 Mo. App. 367; Beasly v. Transfer Co., 148 Mo. 420; Batten v. Transit Co., 102 Mo. App. 285; Smiley v. Railroad, 160 Mo. 629; Gerdes v. Foundry Co., 124 Mo. 347; Rosenkranz v. Railroad, 108 Mo. 9; Chilton v. St. Joseph, 143 Mo. 192; Strohm v. Railroad, 96 N. Y. 306; Curtis v. Railroad, 18 N. Y. 534; Watson on damages for Per-

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sonal Injuries, sec. 302, et seq.; Joyce on Damages, sec. 244.

We find no other error, but for that appearing in plaintiff's fifth instruction the judgment is reversed and the cause remanded. All concur.

JOHN A. STEPHENS, Respondent, v. DEATHERAGE LUMBER COMPANY, Appellant.

Kansas City Court of Appeals, March 27, 1905.

1. **MASTER AND SERVANT: Fellow-Servant: Evidence.** Evidence relating to the duty of a fellow-servant in unloading lumber from a car to a wagon is reviewed and found to show that the injury occurred by the act of a fellow-servant, and not of the vice-principal.

2. ——: ——: **Vice-Principal: Dual Capacity.** It is the character of the negligent act itself which determines the relation of the actor to the injured servant; if the act be in the exercise of delegated authority the master is liable, if it arises from mere colabor it remains the act of the servant.

3. ——: ——: ——: ——: **Jury.** Whether servants of the same master are fellow-servants is generally a question of fact for the jury; but if the facts are admitted and all reasonable men will agree in the legitimate conclusions to be drawn therefrom, it is a question of law.

Appeal from Jackson Circuit Court.—*Hon. Andrew F. Evans*, Judge.

REVERSED.

Botsford, Deatherage & Young for appellant.

(1) Neither the defendant nor Floyd were in any way negligent. (2) The plaintiff was himself negligent, and his negligence caused or contributed to the injury which he received. Moore v. Railroad, 146 Mo.

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572; Palmer v. Tel. Co., 91 Mo. App. 106; Hurst v. Railroad, 163 Mo. 322. (3) Plaintiff's counsel in his argument assumes that there must have been a foreman in connection with the work in question. There is nothing in the case to show that there was any necessity for a foreman. (4) Floyd was not a foreman or vice-principal. (5) The power to employ, especially under such circumstances, is not and does not constitute the persons possessing that power, a vice-principal. Glover v. Nut Co., 153 Mo. 342; Hamilton v. Mfg. Co., 4 Mo. App. 565; Mining Co. v. McNally, 15 Ill. App. 188; Tuhe Works Co. v. Bedell, 96 Pa. St. 175. (6) It is well settled that employees may act in a dual capacity. Even if Floyd could be regarded, for some purposes, as performing the personal duties of his master, the work that he was doing on the car in assisting in the unloading of the timbers, was as a fellow-servant. Roland v. Railroad, 20 Mo. App. 468; Marshall v. Shricker, 63 Mo. 308; McGowan v. Railroad, 61 Mo. 528; Lee v. Iron Works, 62 Mo. 565; Moore v. Railroad, 85 Mo. 597; Hoke v. Railroad, 88 Mo. 370; Schaub v. Railroad, 106 Mo. 92; Curd v. Eddy, 129 Mo. 520; Hank v. Lumber Co., 166 Mo. 121; Smith v. Railroad, 151 Mo. 409. (7) A common servant may be entrusted with duties personal to the master. Neglect of the servant in such a case makes the master liable. A servant of superior rank may, as in the case of Floyd, who was a travelling solicitor or salesman, be called upon, as he was, to temporarily fill the place of an ordinary workman. In the latter case, if the servant is negligent, the master is not liable. Baily on Liability of Master to Servant, 244; Crispin v. Babbitt, 81 N. Y. 520; Slater v. Jewett, 85 N. Y. 74; Doty v. Driving Co., 76 Me. 145; Railroad v. Smith, 8 C. C. A. 663, 668; Dwyer v. Express Co., 82 Wis. 307; 12 Am. and Eng. Ency. Law (2 Ed.), 950. (8) The decisions of the courts in other States agree with the Supreme and appellate courts in this State in holding

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that in cases like this the master is not liable. Railroad v. Smith, 59 Ala. 245; Tyson v. Railroad, 61 Ala. 554; McDonald v. Mfg. Co., 68 Ga. 844; Hanby v. Paper Co., 110 Ga. 1; Gunn v. Willingham, 111 Ga. 430; Railroad v. Baugh, 149 U. S. 368; Railroad v. Regan, 160 U. S. 259; Railroad v. Peterson, 162 U. S. 346; Mining Co. v. Wheelan, 168 U. S. 86; Cooper v. Railroad, 103 Ind. 305; 12 Am. and Eng. Ency. of Law (2 Ed.), 949-958; McCasker v. Railroad, 84 N. Y. 81; Brick v. Railroad, 98 N. Y. 215; Hissey v. Coger, 112 N. Y. 616; Copasso v. Woolfolk, 163 N. Y. 472; Allen v. Goodwin, 92 Tenn. 356; Stevens v. Doe, 73 Cal. 27; Donovan v. Ferris, 128 Cal. 48; Rehm v. Railroad, 164 Pa. St. 91; Ricks v. Flinn, 196 Pa. St. 268; Railroad v. May, 108 Ill. 300; Linvall v. Woods, 41 Minn. 212; Hoth v. Peters, 53 Wis. 412; Johnson v. Water Co., 77 Wis. 51; Dwyer v. Express Co., 82 Wis. 307; Klochinski v. Lumber Co., 93 Wis. 424.

Porterfield, Sawyer and *Conrad* for respondent.

(1) If there might be said to be in the record any evidence of contributory negligence on the part of plaintiff, which we deny, it was of that character which is peculiarly within the province of the jury to determine. Two juries have found, by their verdicts for the plaintiff, that he was not guilty of contributory negligence, and, that the negligence of defendant's foreman, Floyd, caused plaintiff's injuries. Petty v. Railroad, 88 Mo. 306; Cook v. Railroad, 19 Mo. App. 329. (2) Defendant's next contention that Mr. Floyd was a fellow-servant with the plaintiff, the teamster, Mr. Halter, and Mr. Mahoney is equally untenable. The evidence on both sides established the foremanship of Floyd so clearly, so undisputably that there is no ground for debate. Add to this the evidence that he in fact supervised the workmen, and the inference that he was authorized to act

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as foreman by the general manager of the defendant cannot be escaped. Stephens v. Lumber Co., 98 Mo. App. 370; Donnell v. Mining Co., 103 Mo. App. 349; Strode v. Conkey, 105 Mo. App. 12, 78 S. W. 678; Gormley v. Iron Works, 61 Mo. 494; Moore v. Railroad, 85 Mo. 595; Hutson v. Railroad, 50 Mo. App. 303; Dayharsh v. Railroad, 103 Mo. 576; Schroeder v. Railroad, 108 Mo. 329; Miller v. Railroad, 109 Mo. 356; Card v. Eddy, 129 Mo. 510; Russ v. Railroad, 112 Mo. 52; Steube v. Foundry Co., 85 Mo. App. 646; Bane v. Irwin, 172 Mo. 317; Richardson v. Mesker, 171 Mo. 667. (3) Mr. Funk and all the other officers of the defendant remained away from this work and entrusted its doing and its management in all its details to Mr. Floyd, and its liability is the same as if what Mr. Floyd did had been done by the highest officer of the defendant company. Donnell v. Mg. Co., 103 Mo. App. 349; Strode v. Conkey, 105 Mo. App. 12, 78 S. W. 678; Brothers v. Carter, 52 Mo. 376; Hutson v. Railroad, 50 Mo. App. 305; Stuebe v. Found. Co., 85 Mo. App. 647; Dayharsh v. Railroad, 103 Mo. 576; Miller v. Railroad, 109 Mo. 356; Card v. Eddy, 129 Mo. 510; Russ v. Railroad, 112 Mo. 52; Bane v. Irwin, 172 Mo. 317. (4) The fact that Mr. Floyd worked more or less with the men under him did not make him a fellow-servant of the plaintiff and does not relieve the defendant of liability. This exact point is decided in the following cases: Gormley v. Iron Works Co., 61 Mo. 495; Dayharsh v. Railroad, 103 Mo. 577; Russ v. Railroad, 112 Mo. 53; Hutson v. Railroad, 50 Mo. App. 303; Haworth v. Railroad, 94 Mo. App. 224; Bane v. Irwin, 172 Mo. 317; Garland v. Railroad, 85 Mo. App. 582; Donnell v. Mining Co., 103 Mo. App. 349; Strode v. Conkey, 105 Mo. App. 12, 78 S. W. 678.

JOHNSON, J.—This cause was here before upon plaintiff's appeal from an order sustaining a motion for new trial. We affirmed the action of the learned

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trial judge—98 Mo. App. 365. Upon a retrial plaintiff recovered judgment in the sum of twelve hundred dollars and defendant is now the appealing party.

But one question will be considered in this opinion as its solution is decisive of the rights of the parties. We have reached the conclusion that under the facts disclosed by plaintiff's evidence, considered either alone or in connection with those brought out by defendant, a recovery cannot be permitted. The injury sustained, if chargeable at all to negligence, was the direct result of the act of a fellow-servant of plaintiff, and not to any act for which defendant as master is liable.

The pertinent facts are as follows: Defendant, a lumber dealer, at and prior to the time of injury, April 16, 1901, was hauling heavy timbers from cars on track in a railroad yard in Kansas City for use in a building under construction. The car being unloaded when plaintiff was hurt was an open coal car provided with sides and ends forming an enclosure some three feet in height. Defendant was using its own team and wagon which were in charge of one of its regular teamsters. The wagon was standing alongside the car. Its floor was about on a level with that of the latter but in order to remove the timbers from car to wagon it was necessary to raise them over the side of the car. The timbers were heavy, being some sixteen feet long and eight inches by fourteen in their other dimensions. Two wooden skids about eight feet long were placed in such a manner as to make an inclined plane from the wagon bed to the top of the car side down upon which the timbers were moved. Four men were engaged in this work, two upon each vehicle. Those in the car raised the timbers to the top of the plane, placed them in proper position thereon and started them down. The men on the wagon attended to adjusting the skids as needed from time to time and placing the timbers in position on the wagon. The men were not stationed but worked inter-

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changeably in the several positions as occasion required. When the accident occurred plaintiff was working on one end of the wagon platform; on the other end was the teamster. Floyd and Monahan were on the car, the former working opposite to the teamster, the latter opposite plaintiff. Floyd and Monahan raised a piece of timber to the top of the plane preparatory to sending it down; the teamster and plaintiff adjusted their respective skids; Floyd gave the warning, "look out!" the teamster was then out of the way and Floyd released his end of the beam; Monahan held his end a brief time longer which caused the Floyd end to reach the wagon a few feet ahead of the other, but the latter end arrived there in time to strike plaintiff who had failed to escape and to inflict a serious injury to his left leg.

Plaintiff's cause of action is based entirely upon the alleged negligence of Floyd in prematurely releasing his end of the beam without allowing sufficient time for plaintiff to get out of the way. Defendant, the master for whom the work was being done, is sought to be held liable under the contention that Floyd was acting in the capacity of foreman and, therefore, was as to plaintiff the master's vice-principal. The facts showing the existence of such relation were a bitterly contested issue. It appears that Floyd was a travelling salesman for defendant and had been temporarily pressed into service to aid in the work of unloading cars, which had been progressing for several days, because defendant was short-handed. On the morning of the day the accident occurred the teamster and Floyd were the only employees who reported for duty. They went to the scene of the work and, being unable to proceed, the teamster stayed with the horses and Floyd went to a telephone, called up defendant's office and was instructed to "pick up" two men to help them. Pursuant to this direction, he hired plaintiff and Monahan, and afterwards "gave them their time," which

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means an order upon defendant for their wages. Much stress is laid upon the giving of orders by Floyd from time to time during the progress of the work of unloading, but it is apparent no orders called for as an exercise of the master's authority were given, for the very obvious reason that no such orders were necessary. The work was of a very simple character requiring the exercise of but little skill if any. The directions and suggestions made by Floyd and the teamster, referred to in plaintiff's evidence, were such as fellow workmen naturally would make to each other in work performed by co-operating efforts. When men join in the lifting of a heavy load they call back and forth their suggestions to insure unanimity of action, and in sending a load down an incline to other workmen similar means ordinarily are used to insure such concert. Because one of the workmen so employed happens to have had some slight authority delegated to him is no reason why the directions or suggestions emanating from him as a mere workman should be raised to the dignity of a master's orders. It is evident from the situation, as well as from the testimony offered by plaintiff, that Floyd's primary duties were those of a mere hand. The delegation to him of the power to employ for temporary aid two other hands was merely incidental. The teamster was an experienced hand at this kind of work and no necessity existed for sending a salesman down to "boss" such a simple operation. It was common labor, not overseeing, of which defendant stood in need.

But if it can be said that Floyd was there as defendant's vice-principal, plaintiff failed to make a case under the rule but recently reaffirmed by the Supreme Court in Fogarty v. Transfer Co., 180 Mo. 490, and by this court in Depuy v. R. R., 110 Mo. App. 110, 84 S. W. 103. The proximate cause of plaintiff's injury was not an order negligently given by the foreman but, as asserted by plaintiff, the negligence of Floyd in handling the tim-

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bers—purely an act of a mere workman. The rule approved in the Fogarty case is stated in this language: "If the negligence complained of consists of some act done or omitted by one having such authority which relates to his duties as a colaborer with those under his control, and which might just as readily have happened with one of them having no such authority, the common master will not be liable. . . . But when the negligent act complained of arises out of and is the direct result of the exercise of the authority conferred upon him by the master over his colaborers the master will be liable." It is the character of the act itself that determines the relation of the actor to the injured servant. If it is one performed in the exercise of delegated authority it becomes the act of the master; and, on the other hand, if it arises from mere colabor it remains the act of a servant.

Applying this test, Floyd's act in releasing the timber cannot by any stretch of the imagination be tortured into the manifestation of authority. It was entirely disassociated from any prerogative of the master. It might have happened with any fellow workman without the intervention of authority. Had Monahan dropped his end first it will not be contended that the fellow-servant rule would not apply, but plaintiff says that the act of Floyd, who was doing exactly the same work as Monahan, must be judged by an entirely different rule because of his rank. The position is untenable. [Harper v. Railroad, 47 Mo. 567; Gormly v. Iron Works, 61 Mo. 492; Whalen v. Church, 62 Mo. 326; Moore v. Railroad, 85 Mo. 588; Bane v. Irwin, 172 Mo. 306; Lee v. Detroit Works, 62 Mo. 565; Card v. Eddy, 129 Mo. 510; Hawk v. Lumber Co., 166 Mo. 121.]

Further, it is contended that the question of the relation of Floyd to plaintiff is one for the jury. In Norton v. Nadebok, 190 Ill. 595, appears this statement of the principle applicable which was approved in the Fogarty case: "As a general rule the question

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whether servants of the same master are fellow-servants is a question of fact to be determined by the jury from all the facts of each case. . . . If, however, the facts are conceded or there is no dispute with reference thereto, and all reasonable men will agree, from the evidence and the legitimate conclusions to be drawn therefrom, that the relation of fellow-servants exists, then the question becomes one of law, and not of fact."

In the Fogarty case the submission of this issue to the jury was sustained because under the plaintiff's evidence it was clear the negligent act was committed in the exercise of authority. In this case, giving to plaintiff's evidence every consideration, it appears from the facts therein disclosed, and the reasonable inference to be drawn therefrom, that there is an entire failure of proof with respect to the issue of *respondeat superior.*

The judgment is reversed. All concur.

THE SCARRITT ESTATE COMPANY, Respondent, v. J. F. SCHMELZER & SONS ARMS COMPANY, Appellant.

Kansas City Court of Appeals, March 27, 1905.

1. **PLEADING: Counterclaim: Assigned Account: Statute.** Under the statute a counterclaim is one existing in favor of the defendant and against the plaintiff, and in an action on an assigned account for rent damages caused the tenant by delay of the assignor in making certain alterations and repairs, while giving a right of action against the assignor, do not constitute a counterclaim against the assignee.

2. **SET-OFF: Statute: Assigned Account: Liquidated Debt: Counterclaim.** A demand in the nature of a debt must be liquidated before it can be set off against an action on an account; otherwise set-off would include counterclaim which is not permitted in this State.

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3. ——: ——: ——: ——: **Other Defenses.** In an action on an account for rent demands for damage to goods by reason of improper repairs and for guard hire are not such defenses as are included under the term "other defenses" used in the set-off statute, which term is restrictive and means a defense to the demand itself and not a set-off nor a counterclaim.

4. ——: ——: ——: ——: ——. In an action for an assigned account for rent, claims for gas and water furnished by the tenant to the assignor while making certain repairs, are not proper set-offs unless they have been liquidated, that is, ascertained debts as to the amounts.

Appeal from Jackson Circuit Court.—*Hon. J. H. Slover,* Judge.

AFFIRMED.

Harkless, Crysler & Histed for appellant.

(1) The court erred in denying the defendant's right to prove its counterclaim and set-off by way of defense to the plaintiff's cause of action. Gen. Stat. 1899, secs. 895, 4488; Lowrey v. Danforth, 95 Mo. App. 441; Trowein v. Calvird, 75 Mo. App. 570; Barber v. Baker, 70 Mo. App. 680; Bobb v. Taylor, 56 Mo. 311; Archer v. Ins. Co., 43 Mo. 434; Skinner v. Smith, 48 Mo. App. 91. (2) The assignee of a non-negotiable instrument or chose in action, stands, for the purpose of enforcing a claim, exactly in the shoes of the assignor. See authorities above cited. (3) If this suit had been instituted by the Nathan Scarritt estate for the recovery of the rent, unquestionably the defendant would have been entitled to interpose these defenses. See cases cited. Miller v. Crigler, 83 Mo. App. 395. (4) The court accordingly erred in directing a verdict for the plaintiff in the case.

Scarritt, Griffith & Jones for respondent.

(1) The several counts of defendant's answer which seek affirmative relief are counterclaims. It is said in Emery v. Railroad, 77 Mo. 350: "Neither can the true

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character of the cross demand be changed by defendant declining to ask judgment for any possible excess in his favor." (2) As counterclaims defendant's answers are not maintainable. R. S. 1899, sec. 605. (3) Defendant's answers are not sustainable as set-offs. R. S. 1899, secs. 4487, 4488. (a) Under the issues framed upon the answer these demands are not set-offs, but are independent actions or counterclaims, aggregating five times the amount claimed in the petition. And they are pleaded as such. (b) They are unliquidated demands and as such are not allowable as set-offs. May v. Kellar, 1 Mo. App. 385; Brake v. Corning, 19 Mo. 125; Martin v. Ross, 18 Mo. 121; Pratt v. Menkens, 18 Mo. 158; Johnson v. Jones, 16 Mo. 494; State v. Mordell, 15 Mo. 421; Hembrock v. Stark, 53 Mo. 588; McAdow v. Ross, 53 Mo. 199; Zelle v. Sav. Inst., 4 Mo. App. 401; State ex rel. v. Eldridge, 65 Mo. 586; Frowein v. Calvird, 75 Mo. App. 572. (c) Defendant's claims are not alleged to have existed in favor of the defendant at the time this suit was commenced. Reppy v. Reppy, 46 Mo. 571; Todd v. Crutsinger, 30 Mo. App. 145; Skaggs v. Given, 29 Mo. App. 612; Henry v. Butler, 32 Conn. 146; Ellis v. Cathorn, 117 Ill. 458; Lanitz v. King, 93 Mo. 513; Beckman v. Ins. Co., 49 Mo. App. 604; Harrison v. Railroad, 50 Mo. App. 332; Mfg. Co. v. Jones, 60 Mo. App. 219; Story v. Ins. Co., 61 Mo. App. 534; Rogers v. McCraw, 61 Mo. App. 407; Minor v. Coal Co., 25 Mo. App. 78. (4) No one of the counts of defendant's answer state a cause of action against the plaintiff. Boeckler v. Railroad, 10 Mo. App. 448; Clark v. Iron Co., 9 Mo. App. 446; Weber v. Squier, 51 Mo. App. 601; Russell v. Railroad, 83 Mo. 507.

BROADDUS, P. J.—The plaintiff sues defendant on an assigned account for one month's rent for the use of a certain building in Kansas City, Missouri. The answer admits the indebtedness and sets up as defenses various claims as set-offs and counterclaims. It

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alleges that on or about the 17th day of February, 1903, it entered into a contract in writing with the Nathan Scarritt estate, which was transferred to and assumed by plaintiff as a part of the assets of said estate, and the performance of which the plaintiff guaranteed and assumed to carry out; that said contract provided for alterations and betterments of the rented premises, which defendant occupied as a general store; that it was agreed in said contract that the work provided for should be carried on and prosecuted with reference to the convenience of defendant in conducting its business so far as it could be reasonably done, which alterations were to be made under certain specifications, one of which was as follows, to-wit: "Sky lights, roof conductors and metal work around outside of third story to be put in good condition," etc.

It is alleged that the work was performed in an unworkmanlike manner and left in bad condition; that by reason thereof the water that fell upon the roof of the building overflowed said conductors, which were insufficient to carry it off, and ran down the walls of the building, causing them to become damp, thereby damaging defendant's goods in said store to the amount of $500. The second count is a claim for water furnished in and about the construction of said work, which it is alleged was used by plaintiff's assignor, and for which it was plaintiff's duty to pay defendant. The amount claimed is $75. The third count is for gas used during the construction of the alterations, furnished to said assignor and to plaintiff. Amount claimed, $92. The fourth charges that by reason of the unnecessary delay of the work, during which time the building and goods therein were left exposed, and in consequence of such delay plantiff was compelled to hire a guard to protect them at a cost of $405. The fifth count is for injury to defendant's business caused by unnecessary delay in the work of alterations. The amount claimed being $1,000.

On the trial defendant introduced the contract mentioned. C. J. Schmelzer testified that he had heard in court on that day for the first time that the Scarritt Estate Company, plaintiff's assignor, unincorporated, had anything to do with the transaction; that the repairs and alterations were made under said written contract with said assignor. He was then asked to describe the character of the building, etc., whereupon plaintiff's counsel objected to the question on the ground that it was "incompetent, irrelevant and immaterial under the pleadings," and insisted that defendant "should first show an assumption of the contract by plaintiff." The defendant's counsel then stated: "Defendant desires to state to the court and counsel that the defense offered under this answer will be limited to a defense against plaintiff's action. We will not insist, even though we might do so for any judgment over and against, but simply rest on the proposition of attempting to defeat plaintiff's cause of action." Thereupon the court refused to permit defendant to proceed further until it showed that plaintiff had assumed the contract read in evidence. At this stage of the case plaintiff was permitted to introduce the certificate of its incorporation. After the introduction of the certificate mentioned, defendant's counsel stated: "I now desire to offer testimony to sustain all of the claims set up in the counterclaim for the sole purpose of showing that we do not owe that amount sued for by plaintiff, independent of any question of assumption." The court refused to permit defendant to introduce its proposed testimony. The court instructed the jury to find for plaintiff. Accordingly, a verdict was returned for plaintiff for its demand, and judgment rendered thereon; from which defendant appealed.

The defendant's theory of the case is that under the allegations of the petition, independent of the alleged assumption of the contract in evidence, the de-

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fendant's claims were set-offs and counterclaims, and as such were defenses to plaintiff's demands. The demands set up in the first, fourth and fifth counts of defendant's answer were in the nature of counterclaims. Section 605 of the code, Revised Statutes 1899, defines that a counterclaim "must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the following causes of action: First, a cause of action arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim, or connected with the subject of the action. Second, in an action arising on contract, any other action arising also on contract and existing at the commencement of the action." Two of these demands are for damages caused by the delay of plaintiff's assignor in completing its contract with defendant for alterations and repairs of the building in question. It is true that they did not arise out of the contract in suit to pay rent, but they arose out of the contract for alterations and repairs, which gave defendant a right of action against plaintiff's assignor under the second subdivision of said section. [Green v. Conrad, 114 Mo. 667.] But being a counterclaim it is not available as such because it did not exist in favor of defendant against the plaintiff. The language of the section is that a counterclaim "must be one existing in favor of the defendant and against plaintiff."

But if we understand defendant correctly, it insists that all the demands set up are available as set-offs against plaintiff's cause of action. Section 4487, Revised Statutes 1899, is as follows: "If any two or more persons are mutually indebted in any manner whatsoever, and one of them commence an action against the other, one debt may be set off against the other, although such debts are of a different nature." Section 4488 reads: "In actions on assigned accounts and non-negotiable instruments, the defendant shall be

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allowed every just set-off or other defense which existed in his favor at the time of his being notified of such assignment.''

In order to constitute a set-off the demand must be in the nature of a debt. [Waterman on Set-off, sec. 133.] And the term ''debt'' as defined by most of the appellate courts of the country, does not include a claim for unliquidated damages. [69 Fed. R. 745-746; In re Adams (N. Y.), 12 Daly 454; Watson v. McNany, 4 Bibb. (Ky.) 356; Lindsay v. King, 23 N. C. 401; Dowling v. Stewart, 4 Ill. 193; Baum v. Tonkin, 110 Pa. 569; Powell v. Railroad, 36 Fed. R. 726.] There are some courts that give the word a more extended meaning, but there can be no question that when applied to the statute in question it was not intended to include other than liquidated demands; otherwise, it would also include in some instances counterclaims, which would have the effect of confounding the statutes pertaining to these two classes of demands. Under the statutes a set-off cannot be a counterclaim, nor vice versa. The courts of this State have recognized the distinction between set-off and counterclaim. [Empire Co. v. Boggiano, 52 Mo. 294; McAdow v. Ross, 53 Mo. 199; Emery v. Railroad, 77 Mo. 341.]

But defendant's contention is that although its demands do not constitute set-off, as provided in section 4487, supra, they are made available as a defense under section 4488, supra. That the words ''or other defenses'' includes such claims, and cites in support of its contention Lowrey v. Danforth, 95 Mo. App. 441. There the defense was a plea that the note sued on had been released. It will be seen that the ruling there does not support defendant's views. The defense interposed was to the note itself, not an independent, unliquidated demand. And the term ''or other defense'' is used in a restrictive sense; it must be a defense to the demand itself, not a set-off nor a counterclaim. And as the first, fourth and fifth counts of the answer are

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not defenses against the account sued on, they are not such defenses as the section contemplated; and that they do not constitute set-off is too plain for discussion.

It is insisted that in any event the claims for gas and water furnished to plaintiff's assignor were liquidated demands, and as such were set-offs. The statute provides that one debt may be set off against another. We have already seen that a debt means a liquidated demand. The plaintiff claims if they were not liquidated demands, they were not the objects for set-off. Bouvier's law dictionary defines "liquidated" as that which is made clearly manifest, as liquidated damages, ascertained damages, liquidated debts, ascertained debts as to the amount. A claim is liquidated when the amount due is fixed by law, or has been ascertained and fixed by the parties. [Railroad v. Mills (Col.), 69 Pac. Rep. 317; Commercial Assurance Co. v. Myer, 9 Tex. Civ. App. 7; Mitchell v. Addison, 20 Ga. 50; Kennedy v. Queen's County, 62 N. Y. Supp. 276.] The authorities are too numerous to mention. It follows, therefore, that defendant's claims not being for a debt within the meaning of the statute, and not being a defense to the account itself, they were not proper subjects of set-off.

With this view of the case, it follows that the judgment of the court was proper. It is, therefore, affirmed. All concur.

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STATE ex rel. FLENTGE, etc., Respondent, v. GAWRONSKI et al., Appellants.

St. Louis Court of Appeals, February 7, 1905.

1. **INFANTS: Guardian Ad Litem.** After the commencement of a suit against an infant and service of process on him, the suit should not proceed further until a guardian is appointed to represent him.
2. ———: ———: **Motion to Set Aside Judgment.** Where a judgment had been rendered against a minor, charging his land with delinquent taxes, without the appointment of a guardian *ad litem*, his motion to set aside the judgment was the proper remedy and should have been sustained.

Appeal from Cape Girardeau Circuit Court.—*Hon. Henry C. Riley,* Judge.

REVERSED AND REMANDED (*with directions*).

Robert L. Wilson for appellant.

John A. Hope for respondent.

GOODE, J.—This is an action for delinquent taxes due on a lot in the city of Cape Girardeau. John Gawronski owned a life estate in the lot and Flora Gawronski the remainder over. The action for taxes was instituted in October, 1899, returnable to the January term of the circuit court. John Gawronski was served in Cape Girardeau and Flora in the city of St. Louis. The defendant, Flora Gawronski, is a minor. Judgment was rendered against both defendants at the January term of the court, it seems without an answer having been filed by either. The minor had no guardian or curator, nor was a guardian *ad litem* appointed by the Cape Girardeau Circuit Court to represent her in the action. An execution was issued on the judgment, returnable to the May term of the circuit court and the interests of the two defendants

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in the lot were levied on and advertised to be sold on the 11th day of May. The minor Flora filed a motion on May 7 to quash the execution, stating as a ground that she was under fifteen years of age when summoned in the case and at that time had no guardian or curator and no guardian *ad litem* was appointed to represent her. Proof was taken on the motion which showed said defendant was a child ten or twelve years old and that the facts stated in the motion were true. However, the motion was overruled. Two days later, May 9, Flora Gawronski appeared by James M. Morrison, who a day or two before had been appointed guardian of her person and curator of her estate, and filed a motion to set aside and vacate the judgment for taxes as to her on the ground previously stated. Evidence was taken on that motion, establishing the truth of the ground alleged, but it was overruled, an exception saved and an appeal taken.

Only the interest of the adult defendant, John Gawronski, was sold by the sheriff under the execution May 11, and the purchaser of this interest subsequently reconveyed it to Gawronski for a consideration which prevented the latter from suffering any loss by the tax sale.

The question for decision is whether the court erred in overruling the motion of Flora Gawronski (the appellant) to set aside the judgment as to her. There can be no doubt on this point, as our statute is imperative that after the commencement of a suit against an infant and service of process on him, the suit shall proceed no further until a guardian is appointed to represent him. [R. S. 1899, sec. 558.] This motion properly presented the question for determination. [Ex Parte Taylor, 11 Mo. 661.] The case is precisely like that of Neenan v. City of St. Joseph, 126 Mo. 89, 28 S. W. 963. In that case a judgment for taxes on certain premises in the city of St. Joseph had been rendered against a minor defendant without the

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appointment of a guardian *ad litem,* and he moved to set aside the judgment as to him. His prayer was granted.

The judgment of the court below is reversed and the cause remanded with the direction to set aside the judgment for taxes as to Flora Gawronski.

All concur.

WOODS, Respondent, v. CARTY, Appellant.

St. Louis Court of Appeals, February 7, 1905.

FENCES: Injuring Animals: Negligence. Under sections 3294 and 3298, Revised Statutes of 1899, if the proprietor of any field fails to inclose it by a fence filling the requirements of section 3295, and animals running upon the common range enter his field on account of his failure to maintain a lawful fence, and if he kills or injures said animals by worrying with dogs or otherwise, he is liable to the owner of such animals in double the damages inflicted, irrespective of whether he was careful or negligent, humane or malicious, in driving such animals out of his field.

Appeal from Dent Circuit Court.—*Hon. L. B. Woodside,* Judge.

AFFIRMED.

Wm. P. Elmer for appellant.

(1) The common law does not require landowners to fence against cattle to recover for trespassing, but in Missouri no action can be maintained for trespass without a lawful fence. Heald v. Grier, 12 Mo. App. 556; 12 Am. & Eng. Ency. Law (2 Ed.), 1039. (2) No obligation rests upon a landowner to fence his lands or to even maintain a lawful fence, before he can drive off animals on his close. All these statutes do is to

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deprive him of any remedy for damages done by trespass. Hughes v. Railroad, 66 Mo. 326. (3) And in driving same from his lands he may use any ordinary means to which a prudent man would naturally resort to, using reasonable care not to inflict injury. 12 Am. & Eng. Ency. Law (2 Ed.), 1045, 1046.

A. E. McGlashan for respondent.

(1) In Missouri there is no such thing as trespass by stock upon lands, not inclosed with a lawful fence. Kaes v. Railroad, 6 Mo. App. 397; Heald v. Grier, 12 Mo. App. 556. (2) Under our statute concerning "Fences and Inclosures," the common law principles are abrogated. Swine can run at large on the range in Dent county and landowners are required to fence to keep swine out and not the owners of swine required to fence to keep them in. Gorman v. Railroad, 26 Mo. 441; O'Riley v. Diss, 41 Mo. App. 184; Bradford v. Floyd, 80 Mo. 207. (3) Sections 3294, 3295 and 3298, come within the police power of the State the same as section 1105. The same interpretation and construction given section 1105 is applicable to section 3298. (4) The above section of statute impose on the farmers, as well as railroads, the obligation to inclose their fields with a lawful fence, defines a lawful fence and imposes as a penalty for failure to erect and maintain a lawful fence, double damage upon any person injuring any animal that may break into his inclosures because of his unlawful fence. Kelley's Justice Practice, sec. 540. (5) Injury to stock, unless trespassing on fields legally fenced, is redressed without any inquiry as to whether the stock, when they received the injury, were on the lands of the owner or that of the individual committing the wrong. Gorman v. Railroad, 26 Mo. 446. (6) To enable a person to justify, under the act concerning fences and in-

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closures, for killing his neighbor's stock, he must bring himself exactly within the protection of the statute by proving a lawful fence. Early v. Fleming, 16 Mo. 154.

STATEMENT.

The suit was commenced before a justice of the peace by filing the following complaint:

"Now comes the plaintiff and for cause of action states that, on or about the ninth day of August, 1902, he was the owner of four hogs, to-wit, four sow shoats or gilts, of the weight of about one hundred and fifty pounds and about one year old, and that on or about the ninth day of August, 1902, said hogs while running at large on the range got into John Carty's field or farm because of the want of sufficient and lawful fences around his field and farm and that on the day said hogs got into his field and farm aforesaid the defendant did unlawfully hurt, wound and kill said hogs or cause the same to be done, by running and worrying said hogs with a dog and men and by beating, hitting and rocking said hogs and by throwing them over the fence and otherwise ill-treating them, causing injuries and overheat from which all four of said hogs died, wherefore plaintiff was injured and damaged in double the value of said hogs. Plaintiff states that the value of said hogs was forty-five dollars and therefore plaintiff, in accordance with section 3298 of the Missouri R. S. of 1899, upon which section this action is founded, asks judgment for double damages, to-wit, for ninety dollars, together with costs of suit."

The cause was appealed to the circuit court where on a trial *de novo* plaintiff recovered a verdict for forty dollars which was doubled by the court and judgment rendered accordingly. Defendant appealed.

Plaintiff introduced his evidence to sustain the allegations of the statement and rested. The defendant introduced evidence to disprove same, and also in-

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troduced evidence tending to prove that he caught the hogs in suit and put them out of his field with a man and dogs and in so doing he used such care as an ordinarily prudent and careful man would use under like circumstances, and that there was nothing in the size, character, habit or viciousness of the dog or the mode of setting him on or using him, showing lack of the exercise of ordinary care or prudence.

The court instructed the jury as follows for plaintiff.

"1. The court instructs the jury that this is an action under section 3298 of the general statutes, which provides that if a person does not have a lawful fence and on account of such fact hogs enter into his field and injure him in any way and he worries them with dogs or otherwise and by such worrying, they are killed or injured such person shall be liable to the owner of said hogs in double damages with costs. A lawful fence, if composed of posts, boards or palisades, shall be four and one-half feet high with posts set firmly in the ground and not more than eight feet apart and with rails, paling, boards or palisades securely fastened thereto and placed at proper distances apart so as to resist horses, cattle, swine and like stock; a worm fence shall be at least five feet high to the top of the rider or if not ridered shall be five feet to the top rail or pole and shall be locked with strong rails, poles or stakes. In this case, however, the fact that the fence was not of a height required by law will not make the defendant liable in this action unless you believe from the evidence that the hogs entered the field by going over the fence; that is to say, no defect of any kind in the fence would fix the liability on the defendant unless you believe from the evidence that such defect was the place where the hogs entered the field. If the defect through which, or by which, the hogs entered the defendant's field was caused by the action of the water or any other agency not under the control of the defendant,

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then he would have a reasonable time, after such defect was so caused, within which to repair the same and during such time would not be liable for damages to stock under above section.

"2. A reasonable time within which to so repair is such time as a reasonably prudent man would take to repair a fence in like condition and under like circumstances. If the hogs entered the defendant's field at a hole or defect in the fence, of which he had no knowledge and which did not exist when the fence was built, then he would not be liable in this action unless such defect had existed for a sufficient time that a reasonably prudent man would have ascertained the same. The plaintiff is not required to prove the manner and place of entrance of the hogs into said field by positive testimony, but he may prove it by circumstances, provided the proof of the circumstances relied upon to establish the facts are sufficiently strong to satisfy you of the fact sought to be established.

"3. If, therefore, you find from the evidence that defendant's fence around the field in question was not a lawful fence as herein defined and if plaintiff's hogs entered defendant's field by or through any defect in such fence which prevented it from being a lawful fence and if defendant worried them with dogs or caused it to be done or beat them, and if such worrying or beating killed or injured and caused death of such hogs or any of them, you should find for the plaintiff and also find the value of same hogs so killed, at the same time or injured so they died therefrom soon afterward. Provided, however, if you find that the hogs entered said field at a place where the defect was not in the fence when first built and was caused by some agency not under the control of the defendant and he had not had a reasonable time after such defect was caused to repair the same then you find for the defendant, or if they entered by such defect in the fence which was unknown to the defendant and if it had not

existed for such a length of time that a reasonably prudent man would have discovered the same, then the issues should be found for the defendant."

The court refused the following instructions asked by defendant:

"2. The court instructs the jury that although you may find that the fences around the farm of the defendant were not lawful fences and that by reason thereof the hogs in question got into defendant's farm and that defendant at the time and place alleged in the complaint dogged said hogs and caught and put them out of his field, and thereby caused the death of said hogs, yet defendant is not liable unless it is further proven by the plaintiff, that in dogging, catching and putting said hogs out of said field that defendant was guilty of negligence and resorted to such means as an ordinarily prudent man would not use under the same conditions, and the question as to whether the defendant was guilty of negligence would have to be proven by testimony, other than the mere death of said hogs.

"3. The court instructs the jury that the defendant had the right to put said hogs out of his field and to use all reasonable and ordinary means such as a prudent man would resort to in order to accomplish that end. And it is permissible to use a dog to catch or run said hogs out of the field unless there was something in the size, character, habits and viciousness of the dog or mode of setting him on, which shows lack of the exercise of ordinary care or prudence.

"4. A man is said to be exercising ordinary care within the meaning of the foregoing instructions, if he put said hogs out of his field in a way and manner that an ordinarily careful and prudent person in the same relation and under the same circumstances and conditions would have done.

"5. Defendant would not be guilty of negligence within the meaning of instruction numbered one unless he resorted to such means to get said hogs out of his

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field that an ordinarily prudent man would not use under the same circumstances and conditions."

BLAND, P. J. (after stating the facts).—The only error discussed on the oral argument and in the briefs of counsel is the giving and refusing of instructions. Appellant's contention is, that notwithstanding his field was not inclosed by a lawful fence through or over which respondent's hogs entered, he had a right to drive them out and, if in doing so he used ordinary care not to injure them, he is not liable though he, in fact, killed, maimed and wounded them. Section 3294, chapter 28 (entitled "Fences and Inclosures"), Revised Statues 1899, provides: "All fields and inclosures shall be inclosed by hedge, or with a fence sufficiently close," etc. The next section describes what shall constitute a lawful fence. The two succeeding sections (3296, 3297) are in respect to the liability of owners of stock that enter the fields of another inclosed by a lawful fence. The next section is the one upon which the suit is predicated and reads as follows:

"If any person damnified for want of such sufficient hedge or fence, shall hurt, wound, lame, kill or destroy, or cause the same to be done by shooting, worrying with dogs, or otherwise, any of the animals in this chapter mentioned, such person shall satisfy the owner in double damages with costs." [Sec. 3298, R. S. 1899.]

It seems to me that, reading sections 3294 and 3298 together, the Legislature intended that the proprietor of any field or other land, from which he wished to exclude animals running on the common range, must inclose it by such a fence as is described by section 3295; that if the proprietor incloses any field by an unlawful fence (a fence not filling the requirements of the statute) and animals running upon the common range enter his field over or through such unlawful fence and do him damage, if he, in the language of the statute,

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"shall hurt, wound, lame, kill or destroy or cause the same to be done by shooting, worrying with dogs, or otherwise," any of the animals mentioned, he shall be liable to the owner in double damages, and that this is so, irrespective of whether he was careful or negligent, humane or malicious in driving them out. Under the statute it was appellant's duty to inclose his field with a lawful fence to prevent animals running at large from getting into his field. By neglecting the performance of this duty, appellant was primarily guilty of negligence *per se* and it may be justly said that it was through his own neglect the respondent's hogs entered his field and damaged his crops. Under the circumstances, the hogs were not trespassers (Kaes v. Railway, 6 Mo. App. 397; Heald v. Grier, 12 Mo. App. 556) as the owner might permit them to run on the common range, and the appellant, if he would fence against them, was required to do so by a lawful fence. [Bradford v. Floyd, 80 Mo. l. c. 211.]

Appellant refers to Hughes v. Railroad, 66 Mo. 326, and Heald v. Grier, supra, as holding that the proprietor is under no legal obligation to inclose his land. This is so in the sense that the Legislature had not made the duty to fence an absolute one. But if the proprietor would protect himself from damage by animals running at large on the common range or look to the owner of such animals for reparation if his crops are damaged by them, he must, under the statute, show that his field was inclosed by a lawful fence. The converse of the proposition is equally true, to-wit, if a proprietor whose fields are not inclosed by a lawful fence would avoid liability for injuring such animals in driving them out of his fields, he must do them no injury.

I think the instructions given clearly and correctly state the law of the case and that those refused did not correctly state the law. It follows that the judgment should be affirmed and it is so ordered. All concur.

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BROWN and MOORE, Respondents, v. DURHAM, Appellant.

St. Louis Court of Appeals, February 7, 1905.

1. **ARBITRATION: Award: Reconsideration.** When arbitrators in pursuance of the submission have made, signed and delivered their award, their authority is at an end and they cannot reopen the case and make a fresh award without consent of both parties.

2. ——: ——: ——: **Evidence.** And evidence is inadmissible on a motion to confirm the award for the purpose of explaining the action of the arbitrators in reconsidering the first and making a second award.

Appeal from Wayne Circuit Court.—*Hon. Frank R. Dearing,* Judge.

AFFIRMED.

S. R. Durham for appellant.

(1) Mere errors of law, or incorrect conclusions as to facts, do not of themselves constitute sufficient grounds for setting aside the award. But there must be proven misconduct of the arbitrators which is calculated to prejudice the rights of the party complaining. There must be not merely an error of judgment, but an intention to do wrong. Bennet v. Russell, 34 Mo. 524; Newman v. Labeaume, 9 Mo. 30. An award will not be set aside or vacated on motion because illegal evidence was admitted or there was an error of judgment. Vaughn v. Graham, 11 Mo. 575; Bridgman v. Bridgman, 23 Mo. 272. An arbitrator is not a competent witness to impeach his own award. Ellison v. Weathers, 78 Mo. 115. And the affidavits of the arbitrators filed herein by Brown and Moore cannot be considered in so far as they attempt to impeach their find-

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ing. The rule is now well settled in this State that the courts will not receive the affidavits of jurymen to show mistakes or errors of the jurors in respect to the merits, or that they mistook the effect of their verdict, or intended something different. Watts v. Brain, Croke Eliz. 778; State ex rel. v. George Bros., — Mo. —. They ought not to be permitted to declare with a view to affect their verdict an intent different from that expressed in their finding. (2) The arbitrators are sole judges of the testimony submitted to them within the powers delegated to them by the submission, and if it appear that they acted within the terms of the submission, their award cannot be attacked on the ground that its conclusions are unjust. Hinkle v. Harris, 34 App. 223; Mitchell v. Curran, 1 App. 453; Ledlie v. Gamble, 35 Mo. App. 355; Allen v. Hickam, 156 Mo. 49. (3) The arbitrators have the right to open a case, even after they have drawn up their award, as long as it is not delivered. Sweaney v. Vaudry, 2 Mo. App. 352; Byars v. Thompson, 12 Leigh (Va.) 550. (4) The power of an arbitrator is not terminated by the delivery to the parties of an informal statement of their conclusions. Bodge v. Hull, 59 Mo. 225.

James F. Green for respondents.

When once an award is made the arbitrators have no more authority to make a second one on the same subject, without the consent of parties, than they would have had to make an award without any submission. Doke v. James, 4 N. Y. 568; Aldrich v. Jessamine, 8 N. H. 516; 11 Am. & Eng. Enc. of Law (N. S.), 698; Vaughn v. Graham, 11 Mo. 368; Bridgman v. Bridgman, 23 Mo. 272; Valley v. Railroad, 37 Mo. 445; Mitchell v. Curran, 1 Mo. App. 453.

BLAND, P. J.—There being matters of difference between E. W. Moore, R. A. Brown and Alexander

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Dow, they, on March 31, 1903, entered into a written agreement to submit their differences to D. M. Clark, John Schiek and A. J. Durham, as arbitrators. The arbitrators qualified, set a time and place for the hearing, gave notice thereof to the parties, and on the day appointed both parties appeared before the arbitrators who, after hearing all the evidence, made the following award:

"We, the undersigned, arbitrators, having been duly selected to hear and determine all the issues and matters of dispute between R. A. Brown and E. W. Moore on one hand and Alexander Dow on the other, do hereby make report of our findings on said controversy.

"After taking the oath prescribed by law, viewing the premises, hearing the testimony and listening to the argument of counsel, we, after due deliberation, do hereby make report of our finding, after a full and fair accounting of all the matters of dispute between the parties and after allowing all just credits and set-offs, we find that Alexander Dow is indebted to R. A. Brown and E. W. Moore in the sum of two hundred and twenty-seven dollars ($227) and we find that the issues for them in that amount.

"We further find that the deed made by Alex. Dow and wife to R. A. Brown, dated October 29, 1898, was and is a warranty deed and that it was intended and accepted as such and further find that there was no intention at any time to hold said deed to be a mortgage or anything but a bona fide deed.

"Witness our hands this 5th day of April, 1903.

"D. M. Clark,
"John Schiek,
"A. J. Durham.

"Attest:
S. J. Hawkins."

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The arbitrators delivered the award to S. J. Hawkins, attorney for Brown and Moore. After this award was made and signed, but on the same day, the attorney for Dow filed before the arbitrators the following motion:

"In the matter of the arbitration between R. A. Brown and E. W. Moore on the one hand and Alex. Dow on the other.

"Now at this day comes Alex. Dow by his attorney, and moves the arbitrators to reconsider their decision in this case, for the following reasons, to-wit:

"Because there was evidence introduced contrary to the agreement of the parties to the controversy.

"Because the certified copies of deeds should not have been permitted to have been introduced, as they were not competent nor relevant testimony in the case.

"Because the finding is erroneous, wrong, and ought not to stand.

"Because there is no evidence to support the finding.

"Because the finding should have been for Dow."

Without the case being resubmitted and without hearing any additional evidence, and in the absence of Moore and Brown and their attorney, the arbitrators reconsidered their finding and made the following other award:

"We, the undersigned arbitrators, having been duly selected and appointed to hear, try and determine all the issues, matters and things of dispute between R. A. Brown and E. W. Moore on the one hand, and Alex. Dow on the other, as fully and completely as the same are set forth in their articles of submission to arbitration, do hereby report our proceedings.

"After first having taken the oath prescribed by law, we gave notice to the parties herein, and of the time and place fixed for the hearing of said cause, and pursuant to said notice and by consent of both parties, both parties appearing before us, we proceeded to hear

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the evidence, view the premises, hear the claims of each party and the argument of the counsel, and after due deliberation do hereby make report of our finding. . . .

"Upon reconsideration and after a full accounting of all differences and after allowing all just demands and set-offs, we find that Alex. Dow is entitled to recover of and from R. A. Brown and E. R. Moore the sum of nineteen hundred and fifty and 69-100 dollars, and we find the issues from him in that amount, and that Dow delivered to Brown and Moore a deed to the northeast quarter of section 16, township 30, range 1 east, the east half of the northwest quarter of section 14, township 30, range 1 east, and the north half of the northeast quarter of section 12, township 29, range 2 east.

"Witness our hands this fifteenth day of April, 1903.

"D. M. Clark,
"A. J. Durham,
"John Schiek,
"Arbitrators.

"Attest:
"George M. Turner, Witness."

On the 16th day of April, 1901, Alex. Dow assigned the said award to the appellant and, on August 7, 1903, during the August term of the Wayne Circuit Court, he filed his motion in said court praying for a judgment of confirmation thereon.

The award in favor of Moore and Brown was also filed in the office of the clerk of the circuit court and, on the convening of court, a motion was filed for its confirmation. The court refused to confirm either award and overruled both motions. Durham appealed from the order overruling his motion to confirm the award made in Dow's favor. On the hearing of the motions to confirm, affidavits were read and some evidence was heard in favor of and against both awards

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and for the purpose of explaining the action of the arbitrators in reconsidering the first and making a totally different award. These affidavits and this evidence were clearly inadmissible for the reason that as soon as the first award was made, signed and delivered by the arbitrators, their authority was at an end and they were not at liberty to reopen the case and make a fresh or new award without the consent of both parties. [2 Am. and Eng. Ency. of Law (2 Ed.), pp. 698-9; Pollard v. Lumpkin, 6 Gratt. (Va.) 398; Aldrich v. Jessiman, 8 N. H. 516.]

The judgment is affirmed. All concur.

COMMERCIAL BANK, Respondent, v. BRINKERHOFF, Appellant.

St. Louis Court of Appeals, February 7, 1905.

1. **PRACTICE: Reopening Case: Discretion of Court.** Where the trial court at the close of the case made and filed its finding of facts, its refusal, the following day, to reopen the case and let in evidence of facts which the party offering it knew and could have testified to in the first instance, was proper exercise of discretion.

2. **———: Newly-Discovered Evidence: Diligence.** Where a motion for new trial by a defendant on the ground of newly-discovered evidence showed by an accompanying affidavit that the witness relied upon for the new evidence had been a defendant in the case, but the suit as to him had been dismissed before the trial and that his knowledge of the facts was not communicated to the defendant filing the motion, until after judgment, no laches was shown in failing to discover such evidence before the trial.

3. **PRINCIPAL AND SURETY: Extension of Time: Discharge of Surety.** The extension of time by the principal on a note which would discharge his surety from liability, must be for a valuable consideration and for a definite time; a mere promise of indulgence, though upon sufficient consideration, if for no certain time, does not release the surety.

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Appeal from Greene Circuit Court.—*Hon. James T. Neville,* Judge.

AFFIRMED.

J. P. McCammon for appellant.

(1) While granting that the conduct of a trial is a matter largely in the discretion of the trial court, we earnestly insist that under the facts shown here and the uniform practice of that court its rulings were a great surprise to counsel and prevented his making a defense. But however the rejection of the evidence offered may be regarded, we submit that the newly-discovered evidence set forth in the motion for a new trial, supported as it was by the affidavits of defendant and of the witness by whom it could be established entitled defendant to a new trial. 14 Ency. Pl. and Pr., p. 790. (2) By the filing of the motion and affidavit as to the newly-discovered evidence the court was apprised of a new fact, the extension given by plaintiff on the note which alone furnished a complete defense to this action. Knowledge of that fact rested with plaintiff and that witness alone. It is evident to the dullest comprehension, that as long as a suit was pending by plaintiff against that witness on this identical matter that witness would scarcely apprise this defendant of a fact which would prevent his enforcing contribution from this defendant, his cosurety, in the event plaintiff should recover judgment against such witness. Mfg. Co. v. Van Riper, 32 N. J. L. 155; State v. Wheeler, 94 Mo. 254, 7 S. W. 103; Wayt v. Railroad, 45 Iowa 220; Murray v. Weber, 60 N. W. 493; Kenezleber v. Wahl, 28 Pac. 226; Weber v. Weber, 5 N. Y. Sup. 178; Knox v. Bigelow, 15 Wis. 422; Van Horn v. Redmon (Iowa), 25 N. W. 881. (3) If the new evidence is reasonably sure to produce a different result on the trial the appellant's motion should have been sustained. Gilman

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v. Nichols, 42 Vt. 314; Goldsworthy v. Linden, 43 N. W. 659; Keeler v. Jacobs, 58 N. W. 1109; Kenezleber v. Wahl, 28 Pac. 226; Town of Kirby v. Waterford, 14 Vt. 421; Langdon v. Kelly, 51 Mo. App. 577; Dierolff v. Winterfield, 26 Wis. 180.

A. B. Lovan for respondent.

(1) It was altogether within the discretion of the court to refuse to admit the evidence offered by appellant after the case had been finally closed. The appellate court will not interfere with such discretion, unless it should be manifest that it had been grossly abused. 3 Wigmore on Evidence, secs. 1877-1879; Mayor v. Burns, 114 Mo. 426, 19 S. W. 1107; State v. Smith, 80 Mo. 516. (2) The affidavits presented by appellant relating to newly-discovered evidence did not entitle him to a new trial and the court did not commit any error in refusing it for the following reasons, viz.: First. If all the facts stated in appellant's motion for new trial and in the affidavits should be true, appellant would not be released as surety on said note. An extension between the creditor and principal that will discharge the surety must be an extension for a fixed and definite period of time. And further, to effect such an extension as would operate to discharge the surety, there must be some binding contract obliging the creditor to refrain from suing the principal for a certain time. If all the facts contained in appellant's motion and affidavits had been put in his answer in the first place, such answer would have been subject to demurrer, because it would not have stated a defense. 27 Am. and Eng. Ency. Law (2 Ed.), 505. Rucker v. Robinson, 38 Mo. 155; Headlee v. Jones, 43 Mo. 235; Hartman v. Redman, 21 Mo. App. 124; Kansas City v. McGovern, 78 Mo. App. 513; Real Estate Co. v. Clark, 84 Mo. App. 163; Harburg v. Kumpf, 151 Mo. 16, 52 S. W. 19; Steele v. Johnson, 96 Mo. App. 147, 69 S. W. 1065.

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Second. The general rule upon this subject is that the newly-discovered evidence must be not only material in its object, and such as ought to be decisive on another trial, but it must be such evidence as reasonable diligence on the part of the party offering it could not have secured at the former trial. This record shows that the appellant did not use the slightest diligence. He is therefore not entitled to new trial, even if his application and affidavits stated a good defense. State v. Myers, 115 Mo. 394, 22 S. W. 382; Kansas City v. Oil Co., 140 Mo. 458, 41 S. W. 943; Jones v. Furnishing Co., 77 Mo. App. 474; James v. Life Assn., 148 Mo. 1, 49 S. W. 978.

STATEMENT.

This suit was brought on a promissory note for five hundred dollars, dated April 18, 1891, due ninety days after date, payable to plaintiff bank, and signed by the Summit City Mining Company, by J. J. Hibler, President, F. H. Brinkerhoff and Robert A. Moore, defendant, Moore and Hibler signing as sureties. On the back of the note was indorsed a payment of ninety-four dollars which was made March 25, 1893. The suit was commenced January 30, 1903. Hibler answered by pleading his discharge in bankruptcy, and the suit was dismissed as to him. Brinkerhoff's answer was a general denial and a plea of the ten-year Statute of Limitations. The reply alleged the voluntary payment of ninety-four dollars, March 25, 1893, as avoiding the ten-year Statute of Limitations.

The issues were submitted to the court sitting as a jury.

Plaintiff, to sustain the issues on its part, read the note in evidence and showed by W. D. Sheppard, a director of plaintiff bank, that the indorsement of the credit of ninety-four dollars, dated March 25, 1893, was placed on the note at the time the money was paid

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and that it was paid to him by C. V. Buckley, attorney of the bank, who had the note for collection at the time. Witness testified that he did not know who paid the money to Buckley.

Defendant testified that he never paid anything on the note; that nothing was ever paid on it in his behalf by himself or by anyone for him, nor had he ever authorized anyone to pay anything on the note; that he knew who did pay it. At this juncture, plaintiff's attorney told the witness to go ahead and state who paid it and how it was paid, but before the witness could answer, withdrew the question or request, remarking that he did not care to go into it. Defendant's attorney replied that he did not care to go into the matter, and rested.

The court then stated, while the defendant and his attorney were present, that in the absence of any proof to the contrary, the law would presume that the payment credited on the note was a voluntary one and made by the Summit City Mining Company. The court further stated at the time that if it could be shown that the payment was an involuntary one, such payment would not take the note out of the Statute of Limitations. The court again asked defendant's attorney if he had any further testimony, and he replied that he had not.

The court then, in the presence of defendant and defendant's attorney, announced the following finding of facts in the case, to-wit:

"On April 18, 1891, the defendant, with J. J. Hibler and Robert A. Moore, signed the note sued on as surety for the Summit City Mining Company. The note was due ninety days after date. On March 25, 1893, the Summit City Mining Company voluntarily paid on said note the sum of $94.60, and the same was credited on the note. Nothing since has been paid."

The court at the time reduced its finding of facts

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to writing and ordered the writing filed, which was immediately done; and the court announced that if either side desired to argue the case, they could be heard on the following day. On the following day, defendant's attorney appeared in court and asked to be allowed to introduce additional testimony in respect to the payment indorsed on the back of the note, offering to prove by the witness (defendant) that the money which was applied on this note was obtained by an execution from the circuit court of Greene county in a suit against the Summit City Mining Company and others, including this defendant on this note. That the suit was dismissed as to defendant Brinkerhoff and he was summoned to answer another suit on the same note; that sometime afterward, the said execution was sent to Lawrence county; that property consisting of a printing press and all the material in the printing office was levied upon and sold under that execution; that defendant, at the time of the levy and sale, had no interest in the property, having sold it a year or more before.

Defendant also offered in evidence the bill of sale, made by the sheriff under said execution and sale, conveying the said property to S. E. Post for the consideration of one hundred dollars. Also the execution docket of the circuit court of Greene county showing an execution was issued under said judgment to Lawrence county, and the record of dismissal as to defendant and the judgment therein. The notice by the owner to the sheriff making claim to the property levied upon and sold by him was also offered in evidence.

Defendant also offered to show by the testimony of his attorney that on the day preceding the trial he informed plaintiff's attorney, immediately on leaving the courtroom, that he wished to show the facts set forth in the foregoing offer. Defendant further offered to show by his attorney that he (the attorney) did not know that any finding of facts had been made herein,

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and if he had had any reason to anticipate that the court would refuse to admit the testimony which had just been offered, he would have continued at that time.

Defendant further offered to show by said witness that he had been practicing in that court for more than twenty years and that it had been customary to admit testimony, under the circumstances in this case, during the whole of said time, and that he had never known testimony of a witness to be rejected, or of a party not being permitted to introduce testimony under the same circumstances during the entire time he had been practicing at that bar.

The court excluded the foregoing testimony and defendant duly excepted at the time.

Defendant then offered a demurrer to plaintiff's evidence which the court refused and rendered judgment for the plaintiff for the balance due on the note. Defendant appealed.

The following is the fifth ground set forth in the motion for new trial:

"This defendant has since the trial of this cause discovered new evidence which he could not learn by the exercise of any diligence before the said trial, the said evidence consisting of this fact, to-wit: That the plaintiff, after the maturity of the note in suit, agreed to extend the time of payment of said note and did extend the time of payment, for certain good and valuable considerations to it paid by J. J. Hibler, one of the stockholders in the Summit City Mining Company, and president and general manager thereof, which company was the principal debtor on said note, and on which this defendant was a surety only."

Defendant filed the following affidavits in support of this ground for new trial:

"F. H. Brinkerhoff, being duly sworn, upon his oath says that since the trial of the Commercial Bank against F. H. Brinkerhoff et al., in the circuit court of Greene county, Missouri, he has discovered new evi-

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dence, not before known to nor suspected by him and which he was not able to discover before said trial, said evidence consisting of the following facts, which he believes he can prove if a new trial is granted:

"That the note upon which this action is based was the fourth renewal note given by the Summit City Mining Company to the Commercial Bank, this affiant being a surety thereon only, the said Mining Company having received the entire consideration for which said note was given.

"That oral notice was given by Robert A. Moore, another surety thereon, thirty days or more before the maturity of said note, that the said bank must proceed to collect the same at once upon its maturity, and that they would not sign another note in renewal thereof nor be bound longer thereon.

"That said company at the time of and after said notice, and at and for months after the maturity of said note, had property out of which the said note could have been paid and collected if said bank had made any effort to enforce the collection thereof, and was paying other notes during said time.

"That said bank, for and in consideration of benefits accruing to it and received by it from one of the cosureties thereon, agreed tacitly, or expressly and directly, to extend the time of payment of said note, and for said consideration so received by it of said cosurety did so extend the time of payment of same while said company was solvent and had property out of which said note might have been collected during the time it was so extended and made no attempt to collect it.

"That this affiant did not learn the said facts of said extension until after the trial of said cause, and that the said action of said bank in so extending the time of payment and refusing to try to collect the same released the sureties thereon, and that affiant will be able to prove the said facts, as he believes, upon another trial. F. H. Brinkerhoff.

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"Subscribed and sworn to before me this 6th day of November, 1903. JAMES W. SILSBY,

"Notary Public.

"My term of office expires October 29, 1905.

"State of Missouri, county of Greene, ss.:

"J. J. Hibler, being duly sworn, upon his oath says that he has read the facts and allegations contained in the foregoing affidavit of F. H. Brinkerhoff, hereto attached, and that the same are true to the best of his knowledge and belief. J. J. HIBLER.

"Subscribed and sworn to before me this 6th day of November, 1903. JAMES W. SILSBY,

"Notary Public."

BLAND, P. J. (after stating the facts).—1. I do not think the refusal of the court to reopen the case and hear additional evidence offered by defendant, on the day following the one the case was tried and submitted and the court's findings made and filed, was error. The witness (defendant) testified on the trial and disclosed that he knew the facts, and all the facts, that he would have testified to, had the case been reopened, and the record shows that he would have testified to them when on the witness stand had not his own attorney declined to bring them out. In these circumstances, we think the trial court exercised a wise discretion in refusing to reopen the case for the purpose of hearing the proffered evidence.

2. The principal contention of the appellant is that error was committed in overruling his motion for new trial, that the newly-discovered evidence clearly entitled him to a new trial and, if true, would have entitled him to the verdict. I think it is fairly shown that the defendant was not guilty of laches in failing to discover this evidence before the trial. Hibler, though originally a party to the suit, was not a party when the case was tried. By bankruptcy proceedings Hibler had been relieved from his liability on the note

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and was not personally interested in the defense made by the defendant, and for this reason, perhaps, did not disclose this evidence to defendant until after judgment had been rendered. At any rate, defendant swore he knew nothing about it until after the trial, and there is nothing in the record to show that he should have made inquiry in respect to this particular evidence. The respondent, however, contends that the newly-discovered evidence, if true, furnishes no ground of defense, for the reason the affidavits do not show that the bank, if it did extend the time of payment of the note, extended it for any definite time, and if the extension was not for a definite time, the extension, though expressly agreed to for a good consideration, would not relieve the sureties on the note.

In volume 27, at page 505 (2 Ed.), Am. and Eng. Ency. of Law, it is said: "An extension between the creditor and principal that will discharge the surety must be an extension for a fixed and definite period of time," citing in support Vary v. Norton, 6 Fed. Rep. 808, and cases from the States of Arkansas, Georgia, Illinois, Indiana, Maryland, Mississippi, New York, North Carolina, North Dakota, Oregon, Ohio, Tennessee and Texas.

In Rucker v. Robinson, 38 Mo. l. c. 158, it is said: "The agreement must not only be upon a sufficient consideration, but it must amount in law to an estoppel on the creditor, sufficient to prevent him from bringing an action before the expiration of the extended time. . . . The agreement extending the time must not only be valid and binding in law, but the time of the extension must be precisely and definitely fixed."

In Headlee v. Jones, 43 Mo. l. c. 237, citing Rucker v. Robinson, supra, it is said: "The agreement must not only be founded upon a sufficient consideration, but it must operate as an estoppel on the creditor sufficient to prevent him from bringing an action before the expiration of the extended time." The same doctrine is

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held in Owings v. McKenzie, 133 Mo. 323, 33 S. W. 802, and in Noll v. Oberhellman, 20 Mo. App. l. c. 341.

In Donovan Real Estate Co. v. Clark, 84 Mo. App. l. c. 167, this court said: "It is well-settled law that the extension of time for payment of a promissory note, without the consent of the surety to have the effect to release him, must be upon a consideration 'creating a valid and enforcible obligation against the creditor with respect to the enforcement of his claim against the principal debtor.' "

In Barrett v. Davis, 104 Mo. l. c. 558, 16 S. W. 377, it is said: "Where the creditor makes a contract with the debtor for an extension of time, whereby the former's right to enforce an existing liability is stayed for any definite period, without the consent of the surety," the surety is discharged.

In Johnson v. Franklin Bank, 173 Mo. 171, 73 S. W. 191, cited and relied upon by the appellant, it was held that "when time is given to the principal debtor by a valid agreement which ties up the hands of a creditor, though it be for only a single day, the surety is discharged."

That an agreement by the creditor with the principal debtor to extend the time of payment, to effect the release of the surety, must be for a definite and certain time, I think is the unquestioned law. A mere promise of indulgence, though upon sufficient consideration, if for no certain time, does not tie up the hands of the creditor for a day or for any time whatever, and for this reason does not release the surety. The evidence set forth in the affidavit, in support of the motion for a new trial fails to state that the plaintiff agreed to extend the time of payment for a day or for any period of time whatever, and for this reason was insufficient to make out the defense that the defendant was released of his obligation as surety on the note.

Discovering no reversible error in the record, the judgment is affirmed. All concur.

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STATE OF MISSOURI, Respondent, v. HAYS, Appellant.

St. Louis Court of Appeals, February 7, 1905.

1. **CRIMES: Pulling Down Fence.** Under section 1958 of the Revised Statutes of 1899, one who tore down a fence, in which he had no interest, between his land and that of a neighbor, was guilty of a crime although the fence was not so far completed as to "inclose" the neighbor's land.
2. **PRACTICE: Timely Exception.** Unless a timely exception is saved to the admission of incompetent testimony, the error can not be reviewed on appeal.

Appeal from Jefferson Circuit Court.—*Hon. Frank R. Dearing,* Judge.

AFFIRMED.

Kleinschmidt & Reppy, Joseph G. Williams and *A. T. Brewster* for appellant.

Clyde Williams and *R. A. Frazier* for respondent.

GOODE, J.—This appellant was convicted of tearing down part of a cross fence between his farm and an adjoining one. The fence belonged to his neighbor and he had no interest in it. The information on which he was convicted counted on section 1958 of the Revised Statutes of 1899 and the main point relied on for reversal is that the fence did not join to the fence running at right angles to it and hence was not an inclosure. The building of the fence was in progress when the defendant tore it down. The neighbor was running it to join another fence but the supply of rails gave out before he had extended it to a junction with the other, and while he was waiting for more rails the

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defendant committed the depredation. The section of the statute on which the prosecution is founded makes it a misdemeanor to wrongfully or maliciously pull down, injure or destroy part of a fence. The word "inclosure" is used in the statute at one place, but disjunctively. It is an offense, too, to throw down any bars or fences inclosing the land of another. But aside from those clauses there are other provisions by which it is constituted a crime "to pull down, injure or destroy a gate, post, railing or fence, or any part thereof." The defendant committed a crime if, as the jury found, he pulled down the fence of his neighbor, though it was not yet so far constructed as to inclose the neighbor's land.

A question is raised about the cross-examination of one or two of the defendant's witnesses who testified as to his reputation for peace and quiet. One of those witnesses volunteered the information while testifying in chief, that the defendant had been put under bond to keep the peace, and another made the same statement on cross-examination. No exception was saved to this testimony.

The judgment is affirmed. All concur.

BICK, Appellant, v. HALBERSTADT, Respondent.

St. Louis Court of Appeals, February 7, 1905.

PRACTICE: Action on Account: Demurrer. A demurrer will not lie to a petition stating a cause of action upon a running account, made a part of the petition, on the ground that some of the items show the plaintiff is not entitled to recover on them, when the remaining items are proper matters to be stated in the account and entitle plaintiff to offer evidence in their support.

Appeal from Monroe Circuit Court.—*Hon. David H. Eby*, Judge.

REVERSED AND REMANDED.

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Thomas P. Bashaw for appellant.

BLAND, P. J.—The amended petition filed in the case is as follows (omitting caption):

"Plaintiff for amended petition by leave of court first had, for cause of action against defendant states that on the 25th day of August, 1903, the defendant owed and was indebted to W. H. & W. E. McFarland on account in the sum of one hundred and seventeen and 54-100 dollars, with interest then due thereon in the sum of twenty-two and 46-100 dollars, as per itemized bill of indebtedness, with all just credits thereon, which account was assigned and transferred in writing for value by said W. H. & W. E. McFarland to plaintiff, J. J. Bick, on said August 25, 1903, all of which itemized account with the balance due thereon, and interest aggregating to one hundred and forty dollars, the assignment indorsed thereon in writing from said W. H. & W. E. McFarland, which is herewith filed, attached marked Exhibit 'A' and made a part of this petition thereon, for which amount plaintiff asks and prays judgment against defendant, with six per cent interest and cost of suit."

An itemized account consisting of thirty-one items was filed with the petition. The account was opened in November, 1898, and runs through the years 1899, 1900, 1901 and 1902, the last item being dated December, 1902. The defendant demurred to the amended petition on the ground that it did not state facts sufficient to constitute any cause of action. The court sustained the demurrer. Plaintiff stood on his petition, and judgment was rendered for the defendant. Plaintiff appealed.

Defendant has filed a motion in this court to dismiss the appeal on the ground that plaintiff has not properly abstracted the record. The motion is without merit and is denied.

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The account filed with the petition contains an item of damage on orchard by cattle, $10, several items for one-half of taxes paid, an item for one-half the account of Whelan and one for one-half the account of Smith. The contention of respondent is that the statement of these items in the account is not sufficient to entitle plaintiff to recover thereon. This is unquestionably true as to the item of damage to the orchard and may or may not be true as to the items for taxes and the accounts of Whelan and Smith. Whether or not these are proper matters of account depends upon the character of the evidence by which the plaintiff may offer to prove them. All the other items in the account are proper matters to be stated in an account and require no elaboration to entitle plaintiff to offer evidence to establish them; this being so, the petition is not wholly bad, and hence cannot be attacked by general demurrer.

The judgment is reversed and the cause remanded. All concur.

BATEMAN, Respondent, v. TRAVELERS INSURANCE COMPANY, Appellant.

St. Louis Court of Appeals, February 7, 1905.

1. **ACCIDENT INSURANCE: "Voluntary Exposure to Danger:" Demurrer to Evidence.** In an action on a policy of insurance against bodily injury sustained "through external, violent and accidental means," where the deceased, a train porter, on his own train being delayed, was sent to flag approaching trains, as it was his duty to do, and was run over and killed, evidence that he was seen lying on the track and partly raised himself just before he was struck, would not warrant the sustaining of a demurrer to the evidence, because inferences are deducible from the situation other than a voluntary exposure.

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2. ——: ——: **Sitting on Railroad Track.** That the deceased sat down on the track while waiting for a train to approach, was not conclusively a voluntary exposure to unnecessary danger.

3. ———: ———: **Going to Sleep on Track.** That he went to sleep on the track was not a "voluntary" exposure to such danger if he unconsciously fell asleep, or unless he went to sleep intentionally.

4. ———: **"Unnecessary Danger."** The expression "unnecessary danger" as used in a policy of insurance against accidents, where an exception is made in case of voluntary exposure to unnecessary danger, means danger not incident to the duty or avocation of the insured.

5. ———: **"Voluntary Exposure."** The expression "voluntary exposure" in such a policy means a danger incurred consciously by the insured and of his own volition.

Appeal from Greene Circuit Court.—*Hon. James T. Neville,* Judge.

AFFIRMED.

Sebree & Farrington and *Woodruff & Mann* for appellant.

(1) The contract sued on, between insurer and insured, contains an express limitation on the liability of defendant. It was agreed between the parties that if injury or death happened to the insured by reason of his voluntarily exposing himself to unnecessary danger, then the defendant should not be liable. The authorities all agree that the insurance company may thus limit its liability to pay. Bean v. Ins. Co., 50 Mo. App. 464; 2 May on Insurance (3 Ed.), secs. 530, 531. (2) The question is not a question of negligence, but of contract, which the parties made and had a right to make. Overbeck v. Ins. Co., 94 Mo. App. 453, 68 S. W. 236. (3) Death by "voluntary exposure to unnecessary danger," within the meaning of the exemption clause, is where the insured intentionally does some unnecessary act, which reasonable and ordinary pru-

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dence would pronounce dangerous, and his death results in consequence thereof. Tuttle v. Ins. Co., 134 Mass. 175; Morel v. Ins. Co., 4 Bush. 535; Sawtelle v. Railroad, 15 Blatchf. 216.

A. P. Tatlow and *Sherwood, Young & Lyon* for respondent.

(1) There was evidence to sustain the finding of the lower court, sitting as a jury, and the judgment, will, therefore, remain undisturbed. James v. Ins. Co., 148 Mo. 15, 49 S. W. 978; Davis v. Railroad, 46 Mo. App. 180; Cohn v. Kansas City, 108 Mo. 387, 18 S. W. 973. (2) The burden of proof was upon defendant company, to show that the deceased voluntarily exposed himself to unnecessary danger. Jamison v. Ins. Co., 104 Mo. App. 306, 78 S. W. 812. (3) The second instruction was properly refused, not only because there was no evidence that the deceased voluntarily exposed himself to unnecessary danger, but also because it fails to submit that issue to the court sitting as a jury. (4) "There being several inferences deducible from the facts which appear, and equally consistent with all those facts," the defendant [plaintiff] has not maintained the proposition upon which alone it [he] would be entitled to recover. . . . When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof." Smart v. Kansas City, 91 Mo. App. 586; Acc. Ass'n v. Merrit, 98 Mich. 338, 57 N. W. 169; Epperson v. Cable Co., 155 Mo. 382, 50 S. W. 795, 55 S. W. 1050; Fuchs v. St. Louis, 133 Mo. 196, 31 S. W. 115, 34 S. W. 508.

GOODE, J.—This is an action on an insurance contract. The plaintiff's deceased son was insured against bodily injury sustained through external violent and accidental means, the indemnity being payable

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to plaintiff in case of her son's death from a cause covered by the policy. It is conceded the deceased lost his life by an accident sustained through external violence, and the death indemnity is due unless the insurance company is exonerated by the conduct of the deceased just prior to his death having constituted "voluntary exposure to unnecessary danger." The policy exempted the defendant from liability for an accident resulting from such conduct on the part of the insured. The deceased was a railroad porter on the St. Louis & San Francisco Railroad. The night he was killed the train he worked on was delayed in the course of its run and he was sent back to flag any train that might approach from the rear. This was his duty at the time. A train came along and killed the deceased. The engineer of the train testified to seeing him lying on the track as the train approached and that just before it struck him he partly raised as if about to get up. The engineer neither knew why the deceased was lying on the track nor if he was awake or asleep. This was all that was shown about what happened from the time the deceased was sent from his own train until he was run over by the other one.

A declaration of law in the nature of a demurrer to plaintiff's case was asked but properly refused. Beyond doubt the question of whether the deceased was killed on account of a voluntary exposure to danger was for the court sitting as trier of the fact; for there was no certain proof of why the deceased was lying on the track when struck, or that he was to blame for his perilous position. Different inferences on that subject were fairly deducible.

The defendant requested another declaration of law of this purport: that if, while waiting to flag an approaching train, the deceased voluntarily sat down or lay down on the track and remained there, either asleep or awake, until a train ran over him, he was guilty of exposing himself to unnecessary danger and the de-

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fendant was not liable. The effect of that declaration was to exclude a recovery if the deceased voluntarily sat down on the track, fell asleep and remained there asleep until aroused by the train. Therefore, the question is whether such conduct necessarily constituted voluntary exposure to unnecessary danger. We hold it did not. For a railway employee to sit down on a railroad track while waiting to flag a train cannot be pronounced a voluntary exposure to danger under all circumstances. In most instances such an act would involve no danger, but could be done with impunity; and doubtless is done constantly. This is the essence of the whole matter; for if, while sitting on the track, an employee unconsciously should fall asleep, his doing so would not be a voluntary exposure to danger. As said in a former case, if a person should lie down, or otherwise dispose himself for the purpose of going to sleep on a railroad track, he would voluntarily incur an unnecessary danger. [Jamison v. Casualty Co., 104 Mo. App. 306.] It would be rash to presume the deceased went to sleep intentionally instead of being overcome by drowsiness. In the absence of evidence on the subject the probability is very great that if he was asleep when the train came upon him, he was in that state against his will. He knew that to go to sleep on the track was courting death and hardly would have done so unless intoxicated, of which there was no proof. In so far as the refused declaration sought to bring the case within the exception of the policy if the insured was asleep on the track, without regard to whether he went to sleep intentionally or not, it was unquestionably erroneous.

We revert to the effect on the policy if the insured voluntarily sat down on the track. As said above, such an act strikes us as prudent and attended with little or no risk—with none which the deceased was bound to anticipate and can be said knowingly to have incurred. He might go to sleep, swoon, be struck with

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epilepsy or paralysis, or suffer some other visitation which would render him helpless; but ordinarily he would be as safe sitting on the track as standing there. In the Jamison case we examined the decisions to determine the meaning of a clause exempting the insurance company from liability if the insured was injured from "unnecessary exposure to danger or to obvious risk of injury." That exemption was more favorable to the insurance company than the present one, as the latter does not release the company unless deceased voluntarily exposed himself to unnecessary danger. The theory of exemption by inadvertent negligence on the part of the deceased is, therefore, excluded and the company must respond on its contract unless the deceased was killed in consequence of voluntarily incurring a needless risk. What is the meaning of that proviso in this class of contracts? The words "unnecessary danger" signify that the danger meant is one not incident to the duty or avocation of the insured; and this view consists with another term of the policy in which the occupation of the deceased was referred to and he was insured as a train porter; a hazardous calling. The words "voluntary exposure" signify that the insured must be exposed to danger with the consent of his will; which carries the idea that the danger incurred must be realized instead of unexpected. To bring the exemption into play the insured consciously, and of his own volition, must have encountered a risk of injury which he need not have incurred in the performance of his duties with reasonable prudence. The force of such provisos in accident policies has been determined in pertinent decisions which relieve the present case of all doubt. In Burkhard v. Ins. Co., 102 Pa. St. 262, it was held the company was not exempted, though the insured voluntarily did an act which exposed him to danger if he was unconscious of the danger; but that his volition must have been exercised in incurring a risk which he knew threatened

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as the consequence of his act in order to bring the case within the exempting clause. In that decision the court said regarding the conduct of the insured, who was killed in consequence of leaving a train which had stopped on a railroad bridge and falling through a hole in the bridge: "It is true he voluntarily left the car; but a clear distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist; yet the exposure thereto, without any knowledge of the danger, does not constitute a *voluntary* exposure to it. The approach to an unknown and unexpected danger does not make the act voluntary exposure thereto. The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary, yet the exposure involuntary. The danger being unknown, the injury is accidental." Applying that reasoning to the present case, we ask why the deceased should have thought he was in danger if he sat down on the track to watch for a train? If a train came along he could step off the track and flag it, as doubtless he expected to do. The bare possibility that he might fall asleep was so remote that it cannot be treated as a risk which he knew impended and voluntarily incurred. In Lehman v. Indemnity Co., 39 N. Y. Supp. 912, the insured was killed by carelessly stepping on a railroad track without noticing an approaching train, and he was held to have been innocent of a voluntary exposure to danger within the meaning of an accident insurance policy. The court expounded the meaning of the clause in question and distinguished contracts with that clause from those providing, as the Jamison policy did, against exposure to obvious risk of injury:

"We come, therefore, to the consideration of what is meant by a 'voluntary exposure to unnecessary danger,' and this involves a definition of the word 'voluntary.' As we regard it, a voluntary performance of

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an act must require an exercise of the will of the actor. In other words, it is an act done in obedience to, and regulated by, the will of the person who does it. It follows, therefore, that it must be done designedly, and not accidentally; and, consequently, one cannot be said to be guilty of a voluntary exposure to danger unless he intentionally and consciously assumes the risk of an obvious danger. [Miller v. Ins. Co., 92 Tenn. 167; Keene v. Association, 161 Mass. 149; Williams v. Association, 82 Hun 269, 31 N. Y. Supp. 343, 133 N. Y. 367, 31 N. E. 222.] The case last cited furnishes a fair illustration of the distinction which we are seeking to draw, for there the assured, in a spirit of bravado, sat down upon a railroad track, in front of an approaching engine, and, while doing so, was struck and killed. This was a conscious, deliberate act, and was, therefore, beyond all question, one which was voluntary on his part. But in the case at bar the facts are quite different. Lehman had occasion to cross the tracks, in order to reach the point for which he started; and, as he was about to consummate his purpose, a train was observed by him approaching from the south, upon the easterly track. He waited until this train had passed, and then, without taking the precaution to notice the train which was coming toward him from the north, upon the track next to him, he raised his foot and was immediately struck and killed. In this final act of Lehman's is found another and a very apt illustration of this same distinction, for when he saw that the train was coming from the south, he became conscious of existing danger, and exerted his will in order to avoid it; but, when this particular danger had passed, he unconsciously and involuntarily exposed himself to another and a greater risk, in consequence of which his life was sacrificed. Our attention is directed to an English authority, Cornish v. Insurance Co., 23 Q. B. Div. 453, which it is claimed, is precisely in point, and ought to be decisive of this case. The circumstances of the two cases are

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quite similar, it is true, but there is one very marked distinction which deprives the former of any authoritative value in our attempt to decide the latter, and that distinction lies in the difference in the language of the excepting clauses of the two policies. In the Cornish case the policy excepted from the risks insured against, accidents happening 'by exposure of the insured to obvious risk of injury,' but in this case, only those which occur by reason of 'voluntary exposure to unnecessary danger.' We have attempted to show what is intended by the latter term, and, if we are correct in the views expressed, its meaning is quite different from 'exposure to obvious risk.' If that had been the language of the policy in suit, the defendant might with more reason claim that it was relieved from liability, for the risk or danger which confronted Lehman was an obvious one, whether he observed it or not; and by exposing himself to it, whether voluntarily or involuntarily, his case would have been brought within the letter, and possibly within the spirit, of the provision upon which the defendant relies."

The case of Williams v. Association, 31 N. Y. Supp. 343, referred to in the foregoing passage, is unmistakably one in which the insured had brought himself within the exception of the policy as the facts appeared on the first appeal reported in 133 N. Y. 366. On the second appeal (reported in 31 N. Y. Supp. 343), the evidence tended to show that instead of the deceased remaining on the railroad track in a spirit of bravado, he was trying to rescue two drunken men who were in danger of being killed by an approaching train; and it was held that if this was true, his conduct did not constitute a voluntary exposure to unnecessary danger. In Johnson v. Guarantee Co., 115 Mich. 86, it was said a voluntary exposure to unnecessary danger meant a conscious or intentional exposure and included gross or wanton negligence on the part of the insured. See, too, Manufacturing, etc., Co. v. Dorgan, 58 Fed. 945;

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2 Bacon, Benefit Societies, sec. 492. A case quite analogous to the present one, though much stronger in favor of the insurance company, was Fidelity, etc., Co. v. Chambers, 93 Virginia 138. The person accidentally killed was sitting on a bag on a railroad track as a train came around a curve. A witness shouted to him and he started off the track, but reached for his bag and as he did so the engine struck him. It was held this was not a voluntary exposure to danger, but that the deceased simply made a mistake in thinking he could reach his bag and get out of the way before the engine would strike him. It was further said that a voluntary exposure to unnecessary danger meant an act which reasonable and ordinary prudence would pronounce dangerous and did not cover every act of negligence; citing, Insurance Co. v. Osborne, 90 Ala. 201. In Traders Accident Co. v. Wagley, 64 Fed. 457, the deceased was killed while trying to cross a track in front of an advancing train. There was a dispute as to how far away the train was when he started across, and so the case was held to be for the jury, as he might have supposed he could get over the track without being struck. The court said: "Whether crossing a railroad track in front of an advancing train is or is not 'negligence' or 'voluntary exposure to unnecessary risk,' is a question materially dependent upon the distance to be covered by the individual, the distance to be covered by the train and the speed at which the latter is approaching." In the Dorgan case it was held that voluntary exposure sufficient to defeat a plaintiff's right to recover on a policy means wanton or grossly imprudent exposure. The general principle of these decisions is that though the act of the insured may have exposed him to some risk and have been careless, yet, unless he realized the risk and voluntarily incurred it when he was under no necessity to do so, the liability of the insurance company for a consequent injury remains intact. It is not a presumption of law that Bate-

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man, the insured in the present case, realized he was exposing himself to danger by sitting on the railroad track and voluntarily chose to take the risk. If the refused instruction had precluded a recovery if the deceased remained on the track awake until it was too late to avoid the engine, the question of its soundness would be more serious. But as it defeated the plaintiff if the deceased sat on the track and remained there awake or asleep, we have no hesitation in deciding that it was rightly refused. The judgment is affirmed. All concur.

TREFFINGER, Appellant, v. DAVIS REAL ESTATE COMPANY and ROYAL INVESTMENT COMPANY, Respondents.

St. Louis Court of Appeals, February 7, 1905.

ISSUE OF FACT: Conclusiveness of Evidence. Where issues purely of fact, supported by evidence are submitted to the jury, by appropriate instructions, there is nothing left for the appellate court to do but to affirm the judgment.

Appeal from St. Louis City Circuit Court.—*Hon. Walter B. Douglas*, Judge.

Charles J. Macauley for appellant.

Adiel Sherwood and *Joseph S. McIntyre* for respondents.

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STATEMENT.

The defendants, C. R. H. Davis Real Estate Company and Royal Investment Company, are corporations organized under the laws of Missouri and are doing business in the city of St. Louis. At the organization of the Royal Investment Company, the Davis Real Estate Company subscribed for all its capital stock and subsequently distributed it, but the evidence does not show to whom. The place of business of both companies is in the same room. They have the same bookkeeper, and C. R. H. Davis is the president and manager of both companies. In 1899, plaintiff purchased a house and lot, in the city of St. Louis, upon which there was a deed of trust to secure a note for $2,500, the payment of which plaintiff assumed. The note was payable to the C. R. H. Davis Real Estate Company and was held by it at the time plaintiff made his purchase. The note bore interest at the rate of six per cent per annum from date and matured October 1, 1901. Before its maturity, the Davis Real Estate Company transferred it to the Royal Investment Company. Plaintiff testified that he did not know who was the holder of the note at the time he purchased the property and did not learn until about July 28, 1902. At the time plaintiff purchased the property, he placed it in the hands of the Davis Real Estate Company with authority to collect the rents and at the same time counselled with Davis about the incumbrance. Plaintiff was fearful that he would not be able to pay the note at maturity and would lose the property. Davis promised to protect plaintiff and see that the deed of trust was not foreclosed in case plaintiff should be unable to pay the debt at maturity. The rents were collected by the Davis Real Estate Company and plaintiff deposited small sums of money with it from time to time. On August 12, 1902, defendants rendered a statement of the condition of plaintiff's account which is as follows:

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"C. R. H. Davis Real Estate Co. and Royal Investment Co. (Corporations).

To Stephen Treffinger, Dr.

1902.			
August	1,	To bal. as per statement received and account stated thereon	$ 114.45
"	2,	To rent collected for 1445 Carr Lane avenue	7.50
"	12,	To cash paid on account......	35.00
"	19,	To rent collected for 1445 Carr Lane avenue	20.00
Sept.	1,	To rent collected for 1445 Carr Lane avenue	16.50
"	16,	To rent collected for 1445 Carr Lane avenue	21.00
"	30,	To rent collected for 1445 Carr Lane avenue	17.50
			$ 231.95
1902.			
August	4,	By cash paid by defendants for plaintiff on a certain negotiable promissory note, dated Oct. 1, 1898, signed by Cuendet Real Estate Co., owned by defendants	$ 100.00
"	20,	By cash paid interest on said $100 for 34 days	.60
"	30,	By rent commission charged...	.69
Sept.	10,	By amount paid St. Louis Plumbing Company	2.95
"	30,	By rent commission charged..	1.36
Oct.	1,	By cash paid by defendants for plaintiff on a certain negotiable promissory note, dated Oct. 1, 1898, signed by Cuendet Real Estate Company and owned by defendants......	62.25

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By balance due and owing plaintiff Stephen Treffinger, from above named defendants, C. R. H. Davis Real Estate Company and Royal Investment Company	64.10
	$ 231.95."

Plaintiff found a party willing to carry the loan at five per cent, and on October 3, 1902, paid the Royal Investment Company the balance of $1,688.75 then due on the note, including $62.50 as commission for renewing the note. On taking up the note, plaintiff revoked the agency of the defendant for his property and demanded the payment of the balance of $64.10, as shown by the defendant's statement of his account, dated August 12, 1902. Defendants refused to pay this balance, and suit was brought for its recovery before a justice of the peace. From the justice's court the case was taken to the St. Louis Circuit Court by appeal where, on a trial *de novo,* the jury, under the instruction given by the court, rendered a verdict in favor of the defendants. Plaintiff duly appealed.

BLAND, P. J. (after stating the facts).—The defense was that on October 1, 1901, the date the note matured, Davis, as the president of the Real Estate Company, secured a renewal of the note by the Royal Investment Company at the special instance and request of plaintiff, for which service plaintiff agreed to pay two and one-half per cent commission, which amounted to $62.50, to the Royal Investment Company. Plaintiff testified that he never agreed to pay two and one-half per cent or any other commission to have the note renewed and did not know that it ever had been renewed; that he was never consulted about renewing it and never paid anything to have it renewed; that the first intimation he had of its renewal was conveyed to him by the following letter:

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"Saint Louis, July 28, 1902.

"Mr. Steve Treffinger,

"2835 Olive St., City.

"Dear Sir: This is to certify that on July 2, 1902, your principal note for $2,500, due Oct. 1, 1901, was credited with $700 and the time for the principal note was extended to expire Oct. 1, 1902, interest at six per cent on the $1,800 still unpaid.

"Yours truly,

"ROYAL INVESTMENT COMPANY,

"C. R. H. DAVIS, Pres."

Davis testified that the commission of $62.50 through an oversight, was not charged to plaintiff's account at the time the renewal was made but was charged to his account at the time the note was taken up and was charged against him in the calculation of the balance on the note at the date of its payment to the Royal Investment Company. Plaintiff's evidence is that he received a statement of his account as made on October 1, 1902, in which the $62.50 was charged against him as commission for the renewal of his note; that he objected to this item and went to see Davis about it and told him that he would not pay it. But the evidence is uncontradicted that after making his objection to Davis, plaintiff did pay it without objection or protest at the time.

The court instructed the jury that plaintiff could not recover against the Davis Real Estate Company. As this company did not own the note, had no interest in it and was not a party to the renewal of the note, and made no charge therefor, plaintiff failed to make out a case against it. The instructions given to the jury were predicated on the evidence and fairly stated the issues in respect to the alleged agreement to renew the note and whether or not it was renewed by the Royal Investment Company and if renewed whether the commission charged therefor of $62.50 was a reasonable charge. These were purely issues of fact and

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we think they were submitted to the jury by appropriate instructions. The finding of the jury on the issues is conclusive and there is nothing left for us to do but affirm the judgment.

The judgment is affirmed. All concur.

LEU, Respondent, v. ST. LOUIS TRANSIT COMPANY, Appellant.

St. Louis Court of Appeals, February 7, 1905.

1. **STREET RAILWAYS: Boarding Moving Car: Contributory Negligence.** Some of the points on the question of contributory negligence in this case were determined on the former appeal, as the case is found reported in 106 Mo. App. 329, 80 S. W. 273.

2. ———: ———: ———. Whether a passenger, who, attempting to board a car moving slowly, was thrown off by the sudden acceleration of speed, was guilty of contributory negligence, in holding on to the car too long, when if he had let go immediately he would have escaped injury, was a question for the jury.

3. ———: ———: ———: **Falling Voluntarily.** An expression by one of plaintiff's witnesses in his testimony that plaintiff "decided to fall" could not be made a basis for nonsuiting the plaintiff on the ground that he fell voluntarily, when it is evident from the context that the witness meant the plaintiff saw his struggle to get on the car would be futile and he would be less likely to suffer injury from falling than from being dragged further.

4. **PLEADING: Two Acts of Negligence in Separate Counts: General Verdict.** Where, in an action for personal injuries received by plaintiff in attempting to board one of defendant's cars, on account of being thrown by a sudden acceleration of speed, two acts of negligence were charged against the defendant and stated in separate counts, though they could as well have been charged in one count, the petition stated but one cause of action and a general verdict thereon was good.

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5. ———: **Defective Statement Cured by Verdict.** One count, based on the negligence of the defendant in failing to stop the car in time to avoid the injury, alleged that though the conductor knew or by reasonable care could have known that plaintiff was being dragged, he negligently failed to signal the motorman to stop and by reason of that negligence the plaintiff was thrown to the ground and injured, stated a cause of action which is good after verdict, although there was no averment that if the conductor had signalled the motorman to stop, the latter could have stopped the car in time to avert the injury.

Appeal from Audrain Circuit Court.—*Hon. Houston W. Johnson,* Judge.

AFFIRMED.

George Robertson and *Boyle, Priest & Lehmann* for appellant.

(1) Defendant's demurrer to the evidence at the close of plaintiff's case should have been sustained for the reason that the plaintiff's evidence discloses that he was injured as the result of his own negligence in attempting to board a moving car and especially was the injury the result of his own conduct, for after he discovered that the car would not stop, he continued his effort to get upon it and was thereby injured. Wait v. Railroad, 165 Mo. 612, 65 S. W. 1028; Beach on Con. Neg., sec. 37. (2) The plaintiff having adopted the written statements made by him and his witness Gottlieb, as to the facts of the accident, is bound by them. Taking the two together they show such a state of facts as would preclude the plaintiff's recovery, for what the plaintiff says against himself, the law presumes to be true. State v. Hollenschiet, 61 Mo. 307; Nantz v. McPherson, 7 T. B. Mon. 597; Windsor v. Railroad, 45 Mo. App. 123. (3) The court erred in allowing plaintiff to introduce evidence as to the time in which the car could have been stopped. This was brought out in the cross-examination of defendant's

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witnesses. Before evidence of failure to stop the car in time to have averted the injury could have been admitted it must have been alleged, because that was the constituent element of the action, and without it there can be no cause of action. Moore v. Railroad, 176 Mo. 544, 75 S. W. 672; Waldhier v. Railroad, 71 Mo. 514; Zurfluh v. Railroad, 46 Mo. App. 636. (4) Plaintiff's petition states two separate causes of action in separate counts. These separate counts are not merely the same cause of action differently stated. The verdict is general, and the defendant was entitled to a verdict on one count or the other. This point was properly raised by a motion in arrest, which the court overruled. Wells v. Adams, 88 Mo. App. 215.

Fry & Rodgers, Johnson, Houts, Marlatt & Hawes and *L. L. Leonard* for respondent.

(1) This court has decided on a former appeal of this case that the question of contributory negligence was for the jury. Leu v. Transit Co., 106 Mo. App. 329, 80 S. W. 273. (2) The allegations in second count of plaintiff's petition are sufficient. Any defect therein is cured by the verdict. Scamell v. Transit Co., 103 Mo. App. 514, 77 S. W. 1021; Hurst v. Ash Grove, 96 Mo. 168, 9 S. W. 631; Bowie v. Kansas City, 51 Mo. 254; Gerber v. Kansas City, 105 Mo. App. 717, 79 S. W. 717; Robinson v. Ins. Co., 80 S. W. 9; Duneke v. Beyer, 79 S. W. 209; McKinstry v. Transit Co., 82 S. W. 1108.

GOODE, J.—The main facts of this cause necessary for the determination of the present appeal are stated in the opinion delivered on a former appeal and may be found reported in 106 Mo. App. 329, 80 S. W. 273. Recapitulating briefly the testimony for the plaintiff with reference to the contention that he proved no case, we state that there was evidence to show he attempted to board a trolley car of the defendant at the

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intersection of Olive street and Vandeventer avenue. He had signalled the conductor to stop the car, and when he attempted to get on, its speed was so slow as to give the impression to him and other bystanders, that it was going to stop. He took hold of the front rail of the platform at the rear of the car and as he did so the power was put on, the speed of the car suddenly increased and he was dragged thirty feet or more while endeavoring to get a secure footing on the platform. He was finally forced to loosen his hold, thrown to the street and severely injured. The testimony for the defendant was that the car was on its way northward along Vandeventer avenue to the carsheds, intending to turn in for the night, and was not receiving passengers; that the sign "Vandeventer Avenue" which the car carried on the front, had been turned over so the lettering was invisible, thus signifying that no passengers were carried; that whatever reduction of speed occurred just prior to plaintiff's attempt to board the car was in consequence of crossing the Olive street car line and not for the purpose of stopping at the north foot crossing of Olive street. The conflict of testimony was held on the prior appeal to have made a case for the jury on the merits. The argument is pressed again that a demurrer to the plaintiff's case should have been sustained because his evidence shows he was guilty of contributory negligence in holding to the car and continuing his attempt to get aboard, when, if he had let go promptly on the acceleration of the car's speed, he would have escaped injury. It is further contended that the evidence of Gottlieb, one of the plaintiff's witnesses, shows plaintiff got on the platform and then voluntarily fell off. Plaintiff's testimony was that he had placed one foot on the step of the car, when it moved forward with a jerk which loosened his hand from the front rail and he was compelled to grab the back rail, finally grabbing with both hands with his feet dragging on the ground; that all

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the time he was struggling to get aboard and escape a fall. We see no reason to change the former decision that the question of plaintiff's contributory negligence was for the jury on the evidence introduced by the respective parties. The plaintiff was negligent in nothing unless he imprudently boarded the car while it was moving too rapidly for him to do so in safety, or when he ought to have known its speed had been checked, not to take on passengers, but to get past the broken circuit at the crossing of the Olive line, and that it was likely to recover speed immediately. Those questions were for the jury. The movement of the car suggested to others than the plaintiff that it was slowing down to receive passengers waiting on the foot crossing. Besides, the plaintiff's testimony tends to prove the motorman caught his signal and slackened speed in obedience to it. The defendant was charged with negligence in two acts: first, that its motorman carelessly turned on the motive power while the plaintiff was in the act of boarding the car, thereby accelerating the speed and making it impossible for him to get on in safety; second, carelessness on the part of the conductor in omitting to signal the motorman to stop the car when he saw the plaintiff was in peril and likely to be injured if it was not stopped. There was evidence in support of both those charges. As said, the plaintiff's testimony that he lifted his hand for the motorman to stop for him to get aboard, as well as other testimony, went to show the motorman knew he was in the act of taking passage and moved the car rapidly forward while he was doing so. The conductor was on the back platform and the testimony was that he saw the plaintiff dragged from twenty-five to forty feet, but made no effort to have the car stopped until the plaintiff fell to the ground. In truth, it was not stopped until it reached an alley one hundred and fifty feet north of Olive street. It is insisted the plaintiff ought to have alighted as soon as he missed his footing and that his

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injury was due to holding on too long. The plaintiff was trying as best he could to get on the car and save himself; first he grabbed one handbar and then the other in his attempt to get both feet on the lower step; but was finally forced to desist on account of the increasing speed of the car, and fell to the ground. A witness for the plaintiff used the expression that plaintiff "decided to fall," and this statement is made the basis of an argument that plaintiff intentionally fell to the ground and hurt himself. What the witness meant is plain. The context of the statement shows he meant that plaintiff saw his struggle to get on the car would be futile and, as the speed was increasing, let go his hold, thinking he stood less chance of injury by falling on the street than by being dragged farther.

Plaintiff had given a statement regarding his injury to an agent of the transit company. While on the witness stand he was questioned about this statement by the defendant's counsel and said it was signed by his wife for him. The defendant did not offer the statement, but it was put in evidence by the plantiff's counsel without objection. The point is made that the plaintiff was permitted, over the defendant's objection, to testify in impeachment of the statement after it had been introduced by him and made his own testimony. The answer to this objection is that no attempt was made to impeach it. The testimony of the plaintiff in connection with it simply explained when and how it came to be made.

The two acts of negligence charged in the petition were stated in separate counts or paragraphs, and the point is raised that as the verdict was general it cannot stand. Though the two acts of negligence were charged in different counts, they could have been as well charged in one. But one cause of action was stated and the general verdict is good. [Lancaster v. Ins. Co., 92 Mo. 460, 5 S. W. 23.]

The second count of the petition is said not to state

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a cause of action because it contains no averment that if the conductor had signalled the motorman to stop while the plaintiff was in peril, the motorman could have stopped the car in time to avert the injury. The allegation is that though the conductor knew, or by reasonable care could have known, plaintiff was being dragged, he negligently failed to signal the motorman to stop, and by reason of that negligence the plaintiff was thrown to the ground with great violence and injured. Such a defect in a petition is cured by verdict if, by fair intendment, the omitted averment can be gathered from those made. This point was not raised until after verdict. The plain inference from what is stated is that if the motorman had been signalled to stop the car he could have done so soon enough to save the plaintiff from falling. This is the conclusion to be drawn from the allegation that on account of the conductor's negligence in failing to signal, the plaintiff was thrown to the ground. He could not have been thrown to the ground because of the conductor's omission to signal unless the motorman had time to stop after the conductor rang. At the worst, the second count of the petition contains a good cause of action defectively stated. If the defendant wished to object to it, it should have done so by motion or demurrer before trial. [Bowie v. Kansas City, 51 Mo. 454; Munchow v. Munchow, 96 Mo. App. 553, 70 S. W. 386.]

A great many criticisms are made on the instructions of the court, but we think they are without merit and not plausible enough to call for examination in detail. The court gave numerous instructions at the instance of the defendant, which covered every possible defense, and refused none which should have been given.

The judgment is affirmed. All concur.

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HOPKINS, Respondent, v. HARLIN, Appellant.

St. Louis Court of Appeals, February 21, 1905.

1. **PAROL EVIDENCE TO EXPLAIN WRITTEN CONTRACT: Contract Incomplete.** A memorandum of a contract which does not purport to be a complete expression of the entire contract is open to explanation by oral evidence.

2. ——: ——. An order signed by witnesses, directing the clerk of the court to pay their witness fees in a certain case to a bank, is not a complete contract in writing so as to exclude oral testimony in explanation, in an action by such witnesses for the fees collected, against the agent of the bank, who collected them.

Appeal from Howell Circuit Court.—*Hon. William N. Evans*, Judge.

AFFIRMED.

H. D. Green and *Livingston & Burroughs* for appellant.

The only issue in this case is the agreement or contract between the parties. The appellant says he purchased all the fees that might be received for both the March and September terms, and respondent says he sold only the fees of the September term. If there was no written contract, then the issue would be settled by parol testimony. But the terms of the contract are reduced to writing in the order given by respondent for all the fees in the cause. And this is conclusive as to the contract between the parties. There is no fraud charged or shown, and the rule that the written contract is conclusively presumed to include the whole engagement and the extent and manner of the undertaking applies with full force to this case. New England Co. v. Workmen, 71 Mo. App. 275; Parker v. Van-

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hoozer, 142 Mo. 621, 44 S. W. 728; Kemefick v. Brass Co., 72 Mo. App. 381; Bohm v. Stivers, 81 Mo. App. 239; Mfg. Co. v. Hunter, 87 Mo. App. 50; McClurg v. Whitely, 82 Mo. App. 625.

James Orchard for respondent.

Our contention is, as before stated, that this is not a contract in contemplation of law, but is simply an order, which may be varied or explained to show whether or not all the fees were transferred or only a part. Ficklin v. Kerens, 7 Mo. App. 579. We do not think this order would be more binding than a bill of sale, absolute on its face, and the courts hold that a bill of sale, as between the parties, absolute on its face, may be shown to have been intended as security. Moore v. Keep, 5 Mo. App. 593; Newell v. Keeler, 13 Mo. App. 189. And such evidence is admissible in an action at law as well as one in equity. Cane v. Graves, 51 Mo. App. 541.

BLAND, P. J.—A. J. Hopkins, Henry Taylor, Bennett Kirkland, Lum Dean, Will Vaughn, Emmett Williams, William Wilson and Isom Wilson, in 1895, on legal process, attended the Ozark Circuit Court, as witnesses for the defendant, in a case pending in said court wherein the State was plaintiff and Ben Taylor was defendant, on an indictment for grand larceny. The venue of the cause was changed to the Douglas Circuit Court and the above named witnesses were recognized to appear in that court to testify in said cause, at the March term, 1896, and they did appear, in obedience to the recognizance. They claimed their witness fees for each attendance. Their fees were duly allowed, certified to the State Auditor and in due course paid to the clerk of the Douglas Circuit Court (the cause having been dismissed at the March term, 1896, of said court). They jointly and severally executed

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and delivered to the defendant the following order in respect to their fees:

"Ava, Mo., Sep. 29, 1896.

"Circuit Clerk,

"Dear Sir:—Pay to the Bank of Gainesville all my fees as witness and jurors in the case of State of Mo. v. Ben Taylor.

"A. J. Hopkins.	Will Vaughn.
"Henry Taylor.	Emmett Williams.
"Bennett Kirkland.	William Wilson.
"Lum Dean.	Isom Wilson."

With the following indorsement on the back:

"Pay to Guy T. Harrison or order.

"Bank of Gainesville."

For attendance on the Ozark Circuit Court, they were allowed the following fees as witnesses:

A. J. Hopkins.......	$12.25	W. A. Vaughn...	$ 8.50
Henry Taylor.......	10.50	Emmett Williams	11.00
Bennett Kirkland....	8.10	Wills Wilson....	11.00
C. C. Dean..........	8.00	Isom Wilson	11.00

Taylor, Kirkland, Dean, Vaughn, Williams and the two Wilsons assigned their fees allowed at this term of court to plaintiff to enable him to sue and collect the same.

It is admitted that the Bank of Gainesville is a private bank and the defendant, as its agent, took the order for the fees. Plaintiff sued to recover the fees allowed to himself and his assignors at the Ozark term of court, alleging, in substance, that the order given defendant was not given for these fees, that they were included in the order by mistake.

The answer was a general denial.

On the part of plaintiff, the evidence shows that defendant came to him and stated he wanted to buy his fees due for attendance on the Douglas Circuit Court, that plaintiff told defendant he wanted to sell all his fees in the case. Defendant then said he did not want

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the fees which accrued in the Ozark Circuit Court, that they could not be collected and he would not give "the snap of his finger for them." Plaintiff testified that he then agreed to sell his fees for attendance on the Douglas Circuit Court to the defendant at sixty cents on the dollar, at which price defendant agreed to purchase these fees and did purchase and pay plaintiff for said fees on this basis, and that his assignors also agreed to sell their fees for attendance on the Douglas Circuit Court on the same basis and did sell them and receive pay on the basis of sixty cents on the dollar, whereupon they all signed the order; that none of them sold any of their fees for attendance on the Ozark Circuit Court and were not paid one cent for these fees and not intend to give defendant an order for their collection and were not aware that these fees were embraced in the order signed by them. It is admitted that all the fees of these witnesses for both terms of court were paid by the clerk of the Douglas Circuit Court to the defendant on the presentation by him of the foregoing order.

Defendant testified as follows:

"Hopkins came and called me out of the courthouse and asked me if I would buy the fees in the Taylor case; I told him yes, but that I could not pay very much for them, as there was one term that I would probably not get anything for, and there were a number of witnesses that did not testify and under a ruling of the court I did not know whether I would get their fees or not, but I named a sum that I would give them, that is, each one of them, and Hopkins said that would be all right, that it would furnish them whiskey to go home on, and they all signed an order and I paid them the money."

Defendant further testified that he did not buy the fees on a percentage but gave each of the parties a lump sum for all his fees in the case.

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The issues were submitted to the court sitting as a jury. At the close of the evidence, defendant moved the court to declare the law as follows:

"1. The court declares the law to be in this case, that, under the order for fees introduced in evidence, the plaintiff is not entitled to recover.

"2. That the order for fees, given by plaintiff to defendant, is conclusive as to the understanding and agreement of the parties and cannot be changed, altered or modified by parol evidence, and the finding is for the defendant."

The court refused to so declare the law and found the issues for the plaintiff. Defendant appealed.

The only error assigned is the refusal of the court to declare the law as asked by appellant. His contention is that the order for the fees is a contract in writing and could not be contradicted or varied by parol evidence. Not everything that is in writing is written evidence within the meaning of the law. It is only such documents as contain the terms of the contract between the parties and are designed to be the repository and evidence of their final intention that are dignified as such written evidence as cannot be contradicted, varied or explained by oral evidence. [Greenleaf on Evidence (16 Ed.), sec. 275.] A memorandum of a contract that does not purport to be a complete expression of the entire contract is always open to explanation by oral evidence. [Norton v. Bohart, 105 Mo. 615, 16 S. W. 598; Kenefick v. Type Foundry Co., 72 Mo. App. l. c. 385, and cases cited.] The order for the fees is not a complete contract; it is a mere memorandum authorizing the clerk of the circuit court to pay the fees to the bank but is silent as to the disposition the bank should make of the fees after collecting them and for this reason was, as between the parties, open to explanation by oral evidence. We think the court very properly refused defendant's instructions.

The judgment is affirmed. All concur.

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DOYLE, Respondent, v. PARISH, Appellant.

St. Louis Court of Appeals, February 21, 1905.

1. **SALES: Warranty of Quality: Inspection by Purchaser.** As a general rule there can be no recovery on a warranty in the sale of chattels for a perfectly obvious defect which the purchaser had an opportunity to observe, nor for a defect known to the purchaser.

2. ———: ———: ———. But if the purchaser had no opportunity to inspect before purchase, and relied on the warranty, he is protected by the warranty, even though the defect could have been discovered by inspection.

3. ———: ———: ———. Where mules were sold with a warranty as to their age and soundness, in an action by the purchaser for breach of the warranty, evidence that the plaintiff, before the purchase, inspected the mules, would warrant the inference that he noticed the defect, and in that event he could not recover.

4. ———: ———: **Evidence: Harmless Error.** And in such an action, the handbills advertising the sale were improperly admitted in evidence, but the error was harmless where the only representation of the handbills was as to the age of the mules and the defendant admitted that he represented them to be of the age mentioned in the handbills.

5. ———: ———: ———. And where it was shown that the plaintiff gave a note for the purchase price of the mules and on discovery of the defect, notified some bank not to purchase the note, that action would not prevent a recovery on the warranty.

6. ———: ———: **Measure of Damages.** In an action on a breach of warranty in the sale of mules, the measure of damages is the difference between what the mules would have been worth, as represented, at the time and place of sale, and what they actually were worth.

Appeal from Knox Circuit Court.—*Hon. Edwin R. McKee,* Judge.

REVERSED AND REMANDED.

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L. F. Cottey for appellant.

W. N. Doyle for respondent.

GOODE, J.—This is an action on a warranty in a sale of personal property. The case originated before a justice of the peace and the complaint filed in the justice's court states that the defendant advertised for a sale of personal property and among other things, two head of two-year-old mules; that plaintiff had further represented repeatedly that said mules were two years old the spring prior to the time of the sale in September, 1903; that they were sound and free from all defects and blemishes; that just prior to the taking of bids the defendant warranted said mules to be of that age and without blemish; that relying on the aforesaid representations of the defendant as to the age and soundness of the mules, plaintiff bought them for $231; that afterwards she discovered they were three years old the previous spring, and were not sound, but were unsound and blemished; that one of them had a water-seed and the other a water-seed and a wire cut on the left ankle, and that by reason of said facts plaintiff was damaged in the sum of $100, for which she prayed judgment.

The evidence showed that W. N. Doyle, the husband of the plaintiff, bought the mules for her at public auction at the price stated. His testimony is that he had previously spoken to Parish on several occasions about buying the mules and Parish had represented them as perfectly sound and two years old in the spring of 1903. Handbills advertising the sale stated that the mules were two years old, and there was testimony that the auctioneer when he invited bids on them, represented them to be of that age and sound. There was contradictory evidence and under the instructions of the court a verdict was returned for the plaintiff in the sum of $30. The defendant contends

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that the court erred in instructing the jury and in the admission of certain testimony, but concedes evidence tending to prove a warranty was introduced.

1. This case was instructed with extreme carelessness. The instruction copied below was requested by the defendant without the italicized clause, refused as requested and given after the court had inserted said clause:

"The court instructs the jury that if they shall find from the evidence in the cause that the defects complained of by the plaintiff in said mules, the waterseeds and the wire scratch, were such as might have been discovered by the exercise of ordinary attention on the part of the plaintiff's agent, and that plaintiff had an opportunity to inspect said mules before buying them, then the defendant *then the plaintiff in law, did not rely thereon and* is not liable to the plaintiff in damages for such defects."

It will be observed at once that the clause inserted by the court made the instruction wholly meaningless and deprived the defendant of any benefit from it. The instruction as asked was not strictly accurate, for it referred to plaintiff's opportunity to inspect the mules before buying them; whereas it should have referred to the opportunity of her agent. The testimony of the plaintiff herself, who is the wife of W. N. Doyle, and, indeed, all the testimony, is that W. N. Doyle represented the plaintiff in the purchase of the mules; that she relied on him and took no part personally in the transaction except to authorize him to act for her. The mistake of treating plaintiff as the active party in the purchase occurred in several other instructions. But in the instruction quoted, that mistake was a minor matter. It was alleged by the plaintiff and shown by her testimony that the defendant not only warranted the age of the mules, but that they were sound and free from blemishes; whereas, in fact, they were three years old, instead of two as represented, and unsound

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in that there were water-seeds on them. The testimony further went to show that these defects diminished the value of the animals and that neither the plaintiff nor her agent W. N. Doyle, had an opportunity to inspect the mules at any time before the sale and never had inspected them. The defendant testified that previous to the sale, W. N. Doyle had thoroughly examined the mules at the defendant's farm. There was also testimony that the water-seeds and wire scratches were patent and visible and could have been detected by inspection. In most instances there can be no recovery on a warranty in the sale of a chattel, for a perfectly obvious defect apparent on a simple inspection and which the purchaser had an opportunity to observe, unless the warranty expressly covered obvious defects. Neither, generally speaking, can an action be maintained for a defect known to the purchaser. [2 Benjamin, Sales, sec. 821, and cases cited; Tiedeman, Sales, sec. 195; Branson v. Turner, 77 Mo. 821.] If a buyer had no opportunity to inspect the article before he purchased and relied on the warranty and not on his own judgment, the warranty protects him even though the fault could have been discovered by inspection. In the present case W. N. Doyle swore he had no opportunity to inspect the mules before buying; whereas, Parish swore he did inspect them. The inference is fair that if Doyle examined the mules, as Parish said he did, he must have noticed the water-seeds and wire scratches and have purchased with knowledge of those faults; in which event there could be no recovery of damages because of the faults. The defendant is entitled to an instruction expressing that rule; but the one given by the court is unintelligible. In view of the testimony of Parish that Doyle actually made an inspection, there is no occasion for instructing on the theory that if he had an opportunity to inspect and failed to do so, the plaintiff cannot recover.

2. Handbills had been put up advertising the sale

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of the mules and other property by Parish, and describing the mules as two years old. One of these handbills was admitted in evidence, the defendant says, erroneously. It was not strictly competent. [Ransberger v. Ing., 55 Mo. App. 621, 625.] Still, we would not reverse the case for the admission of that document, because the only representation it contained about the mules was as to their age, and Parish himself admitted representing them to be two years old in the belief that they were.

3. The plaintiff gave a promissory note, for part of the purchase price of the mules and on discovering they were not as warranted, notified some banks not to purchase the note. In view of her action in that regard, the defendant insists she cannot maintain an action for breach of the warranty. We fail to see what warning the banks not to purchase the note has to do with her right of action against the defendant on the warranty. The plaintiff is liable on her note if it is still unpaid.

4. The defendant introduced evidence to show the mules, even if three years old at the time of the sale and with the faults alleged, were worth what the plaintiff paid for them, and it is insisted that if they were she is not damaged by the breach of warranty and cannot recover. This contention is erroneous. The measure of damages is the difference between what the mules would have been worth, as represented, at the time and place of sale and what they actually were worth in the condition they were in. [Brown v. Emerson, 66 Mo. App. 63; 3 Joyce, Damages, sec. 1686 and citations.] We are cited to Countney et al. v. Boswell et al., 65 Mo. 196, as authority for the proposition that if plaintiff paid no more for the mules than they were worth, she can recover nothing, though the defendant's warranty regarding them was broken. We understand the decision differently. It was an action on a warranty of a reaping and mowing machine

which plaintiffs had bought from the defendants for $200. The allegation was that the machine was wholly worthless and judgment was prayed for the price. There was no contention that the machine would have been worth more than the price plaintiffs paid for it if it had been as warranted; hence, it was not incorrect to instruct that the measure of damages was the difference between the price paid and the true value.

The judgment is reversed and the cause remanded. All concur.

COFFMAN et al., Plaintiffs, v. GATES et al., Defendants; GHIO and GHIO, Trustee, Appellant, v. HARBAUGH et al., Respondents.

St. Louis Court of Appeals, February 21, 1905.

1. PRACTICE: Death of Party Not Interested. Where a trustee, party to an action, had no interest in the issues involved in the appeal of the case, his death pending the appeal did not make it necessary to delay the case for the purpose of having his successor in trust appointed.

2. TRUSTEES: Removal of Trustee: Divesting Title. An order removing several testamentary trustees and appointing a new trustee in their stead will not have the effect of divesting one of the former trustees of title to certain land and investing the new trustee therewith, where such land was held by the former for himself and in trust for other beneficiaries under the will, having been bought by him under the foreclosure sale of a mortgage given to secure funds of the estate, in the absence of apt words in the order removing the trustees, indicating an intention so to divest and invest title to that particular land.

3. ———: Reimbursement for Defending Trust Property. Where the holder of the legal title to real estate, one-third for himself and two-thirds in trust for other beneficiaries, employed counsel and expended money in defending ejectment suits for the land and paid a judgment for rents and profits accruing while he and his beneficiaries were in possession, he had a right to reimbursement from his *cestui que trust* for their proportion of the amount so expended.

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4. ———: ———: Partition. On the sale of such land in partition, under the jurisdiction of the circuit court to equitably adjust claims of parties in such proceeding, he is entitled to reimbursement out of the funds arising from such sale.

5. ———: ———: ———. He can not have a personal judgment against his *cestui que trust* for the amount expended, but is limited in the partition proceeding to the funds arising from the trust property.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel G. Taylor,* Judge.

REVERSED AND REMANDED.

Noble & Shields, W. B. & Ford W. Thompson and *D. C. Taylor* for appellants.

(1) The circuit court is vested with all the jurisdiction and power that a court of chancery ever had in partition suits. Holloway v. Holloway, 97 Mo. 628, 11 S. W. 233; Saving Inst. v. Collonious, 63 Mo. 290; Spitts v. Wells, 18 Mo. 468; Pratt v. Clark, 57 Mo. 189; Stewart v. Caldwell, 54 Mo. 536. (2) The court having equitable jurisdiction, it was competent for the defendant James C. Ghio, individually and as trustee, to set up his rights, as he did by an answer by way of cross-bill. All the parties in interest and the *res* itself were before the court, and, as stated in the above authorities, the court will not stop short of rendering complete justice between the parties. The court will hear and determine the rights of the parties, and award to James C. Ghio, as trustee, all of his rights as well as to James C. Ghio, as a tenant in common individually, on the principle of avoiding a multiplicity of suits. Trustees v. Greenough, 105 U. S. 533; Railroad v. Pettus, 113 U. S. 116; Pomeroy, Eq. Jur., sec. 1085; Gooding v. Gibbs, 17 How. (U. S.) 277; Perry on Trusts sec. 474; Matter of Holden, 12 N. Y. Supp. 842, 58 Hun (N. Y.) 611. (3) We contend that James C. Ghio is

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entitled to be reimbursed for his expenditures in behalf of the property as cotenant, the benefit of which the other cotenants enjoy. Matter of Holden, 12 N. Y. Supp. 842; 58 Hun 611; 1 Eq. Cases, p. 291; Irving, Eq. Jur., 86; Percy v. Millandon, 18 Martin 616; 2 Story, Eq. Jur., sec. 1236; Coffin v. Heath, 6 Met. 80; Quinette v. Thompson, 19 Am. Dec. 350, 9 Pick. 31; Gage v. Mulholland, 16 Grant Ch. Rep. 145; Carter v. Penn, 99 Ill. 390; Guppette v. Robinson, 14 Ill. App. 377; Wilton v. Tozwell, 86 Ill. 29; Hoven Mehlgarten, 19 Ill. 91; Dillinger v. Kelly, 84 Mo. 561; Hinters v. Hinters, 114 Mo. 26; Hinters v. Hinters, 114 Mo. 29.

Wm. F. Broadhead for respondents.

(1) James C. Ghio, the appellant, ceased to have any authority as trustee under the will of John B. Ghio, from the date of his resignation on July 30, 1892, certainly from April 3, 1893, when the court accepted his resignation, appointed F. X. Barada sole trustee, and divested him of all title as such trustee, and vested the title to the trust estate in the new trustee. He could thereafter bind no one interested in the trust estate, had no interest in this property as trustee under said will, and his only interest in this property, besides his individual share, was that of a trustee holding a barren, inactive trust because he held the legal title. (2) The title to this land as a trust estate under John B. Ghio's will, became vested in the new trustee, Barada, from April 3, 1893, the services were performed, and the expenses and costs accrued after this date, and if appellant's claims are just and legal, his recourse is against Barada as trustee, the holder of an active controlling trust. (3) The claims of the appellant against his codefendants in this partition proceeding cannot be adjudicated, under the law of this State. In re Tyler, 40 Mo. App. 387; Barkhoefer v. Barkhoefer, 93 Mo. App. 378, 67 S. W. 674; Holloway v.

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Holloway, 97 Mo. 639, 11 S. W. 233; Green v. Walker, 99 Mo. 73; R. S. 1879, sec. 3521; Gun v. Thurston, 130 Mo. 344, 32 S. W. 654; Hannsman v. Richtor, 53 Atl. 177, 63 N. J. Eq. 753.

George E. Smith for respondent Layton.

When the title to undivided interest in land is held by a trustee having a power of disposition and management, the *cestui que trust* is neither a joint tenant, a tenant in common, nor a coparcener, with the owner of the other moieties, and cannot maintain an action for the partition thereof. 21 Am. & Eng. Ency. Law (2 Ed.), 1156; Harris v. Larkins, 29 N. Y. Sup. (22 Hun) 488; Thebaud v. Schemerhorn, 10 Abb. N. C. 72. The trustee, however, under the like title, may maintain an action for partition of the land without joining the beneficiary as a party plaintiff. Smith v. Gaines, 38 N. J. Eq. 65; Gallie v. Eagle, 65 Barb. (N. Y.) 583; Snell v. Harrison, 131 Mo. 495, 32 S. W. 37.

STATEMENT.

In a suit brought by Ella Gates Coffman and her husband, G. L. Coffman, and C. L. Travous versus John J. Gates, James C. Ghio, Mary O. Harbaugh and her husband, Simon J. Harbaugh, Andrew S. Barada, Mary E. Layton and her husband W. Pratt Layton, John Ghio Barada, Francis X. Barada, trustee under the will of John B. Ghio, deceased, James C. Ghio, trustee, and John M. Garth for partition of three hundred and five and ninety-six one-hundredths acres of land situated in the county of St. Louis, Missouri, and known as the "Gates farm," on June 5, 1902, the circuit court of the city of St. Louis, to which the cause had been transferred by change of venue, rendered an interlocutory decree of partition and afterwards, on the report of commissioners appointed by the court in said decree, the land was ordered sold. A sale was

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made and approved by the court and the proceeds of sale were ordered distributed by the court. In the order of distribution, Mary Harbaugh was awarded $1,344.91, Andrew Barada $448.30 1-3 and Mary E. Layton $448.30 1-3 as their distributive shares of the proceeds of sale. The distributive shares of the other parties to the suit were paid over to them and are not involved in this controversy.

In his answer to the petition in partition, defendant James C. Ghio, individually and as trustee, claimed that he had been compelled to expend and did expend, for the benefit of his cotenants in the lands the following sums of money:

"1900.	
Oct. 5. Amount paid to attorneys for plaintiff in case of Gates et al. v. Seibert et al., for judgment and costs....	$4062.80
Interest thereon at six per cent per annum, from Oct. 5, 1900, to July 10, 1903	673.74
Oct. 5. Attorneys' fees and expenses of W. B. Thompson in ejectment suits and suit on bond	775.00
Oct. 5. Attorneys' fees and expenses of Noble & Shields in ejectment suits and suit on bond	320.35
Oct. 5. Attorneys' fees and expenses of D. C. Taylor in ejectment suits and suit on bond	281.05
Interest on said amount of fees and expenses, $1,376.40 from October 5, 1900, to July 10, 1903	228.24
1901.	
Jan. 29. Costs of change of venue in case of James C. Ghio, trustee v. Ella Gates Coffman et al	10.00
Interest on same from Jan. 29, 1901, to July 10, 1903	1.51

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July 3. Amount paid William A. Darniel for services and attendance..........	20.00
Interest on same from July 3, 1901, to July 10, 1903	2.42
1902.	
Nov. 2. Costs of circuit court in case of James C. Ghio, trustee v. Ella Gates Coffman et al	41.50
Interest on same from Nov. 2, 1902, to July 10, 1903	1.75
Attorneys' fees in case of James C. Ghio trustee v. Ella Gates Coffman et al..	100.00
Attorneys' fees in this suit	100.00
	$6,618.36"

The answer also made the following claims:

"That one-third of said amount of $6,618.36, or $2,206.12 is chargeable against Mary O. Harbaugh, less her interest in the fund in court, being 1-2 of $2,689.82, or $1,344.91, and that judgment should be rendered against said Mary O. Harbaugh and in favor of said James C. Ghio for $861.21.

"That one-ninth of said amount of $6,618.36, or $735.37 1-3, is chargeable against defendant Andrew Barada, less his interest in said fund in court, being 1-6 of $2,689.82, or $448.30 1-3, and that judgment should be rendered against said Andrew S. Barada and in favor of said James C. Ghio for $287.07.

"That one-ninth of said amount of $6,618.36, or $735.37 1-3, is chargeable to defendant Marie Elsie Layton, less her interest in said fund in court, being one-sixth of $2,689.82, or $448.30 1-3, and that a judgment should be rendered against said Marie Elsie Layton and in favor of said James C. Ghio for $287.07.

"That one-ninth of said amount of $6,618.36, or $735.37 1-3, is chargeable against defendant John Ghio Barada less his interest in said fund in court, being

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one-sixth of $2,689.82, or $448.30 1-3 and that a judgment should be rendered against said John Ghio Barada and in favor of said James C. Ghio for $287.07."

The court denied the relief prayed for and ordered the several distributive shares of Harbaugh, Barada and Layton to be paid over to them; from this order James C. Ghio appealed. That Ghio paid $4,062.81 as judgment and costs in the case of Gates et al. is not controverted; nor is the fact that he paid the attorneys' fees and costs as alleged; nor is it controverted that the attorneys' fees are reasonable. The contention of the three respondents, Harbaugh, Barada and Layton, is that they are in nowise liable to James C. Ghio for any part of these moneys paid out by him.

We will have to begin with the year 1885 to get at the facts out of which this controversy arose. In that year John B. Ghio died testate; by his will he left his estate (a large one) to three trustees, his widow Elizabeth Ghio, William Booth and his son, James C. Ghio (appellant). The trustees, while administering the estate, loaned to Jacob S. Gates and Lavina Gates the sum of $10,000, taking notes for the principal and interest, secured by a deed of trust on what is known as the "Gates Farm." The deed of trust was foreclosed and the trustee in the deed of trust executed his deed to James C. Ghio in which it was provided that Ghio should, as is provided in the will of his father, John B. Ghio, take in fee an undivided one-third interest in the lands to himself and heirs and hold the undivided two-thirds in trust without power of sale, except by consent of the trustees of John B. Ghio's estate; one-third for Mary Barada and her children and one-third for the use of Mary Cummiskey. After the execution of this deed, James C. Ghio, in his individual capacity, and as trustee with Elizabeth Ghio and William Booth, the other trustees of the

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estate of John C. Ghio, leased the lands to William and Albert Seibert for a term of five years at a yearly rental of one thousand dollars. The lessees entered into possession, paid the rent and held the lands as tenants for the term of their lease. The lands were formerly owned by John Gates who died in the year 1872, leaving his widow, Lavina Gates, and three children to whom by will he left most of his property. The fifth clause of his will reads as follows: "I hereby give and bequeath to my son, Jacob Snyder Gates (and his wife if he should marry) and after their decease to his children, the land," etc., which is the same land partitioned by this suit. In 1876 Jacob Snyder Gates married Lizzie A. Cool, who gave birth to a child in 1877. The mother and child died within a month after the birth of the child. In November, 1878, Jacob Snyder Gates married Mary J. Filley, by whom at the time he had an illegitimate child, then about three years old, which he acknowledged as his child and ever afterwards treated her as such. She is now Ella Gates Coffman. There were two other children born of this marriage, John J. Gates and Jacob Snyder, Gates, Jr. Jacob Snyder Gates' wife died in 1884. In 1893 Ella and John J. Gates brought suit in ejectment against Elizabeth Ghio to recover possession of the lands partitioned in this suit. A short time afterwards and in the same year, Ella Gates commenced a like suit against Francis X. Barada et al.; both of these suits were dismissed by the plaintiffs. In September, 1894, a suit in ejectment for the recovery of the lands was brought by John J. Gates (a minor) by his guardian, and Ella Gates versus Seibert et al., which resulted in a judgment for plaintiffs for an undivided eleven-sixteenths of the land and $2,165 damages, and finding the monthly rents and profits to be $35. The case was appealed by the defendants to the Supreme Court, where the judgment was affirmed at the April term, 1900, by a divided court (Gates et

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al. v. Seibert et al., 157 Mo. 254). When the appeal was taken, a supersedeas bond was given by the Seiberts with James C. Ghio as surety. After the affirmance of the judgment, suit was brought on this bond to recover the damages assessed in the ejectment suit ($2,165) with accrued interest and the rents and profits pending the appeal at the rate of $35 per month.

In the judgment for partition, the court found that Ella Gates Coffman had agreed to convey and transfer to Charles Travous one-third of her interest in the lands and set apart and awarded one-third of her distributive share of the proceeds of sale to the said Charles Travous. The interests of Andrew Barada, Mary Harbaugh and Mary Layton were derived by them as descendants of legatees in the will of John B. Ghio. In April, 1893, a suit was brought in the circuit court by William Booth, one of the trustees appointed by the will of John B. Ghio, against the other trustees and beneficiaries under the will, which resulted in a decree relieving the trustees appointed by the will of the trust, and Francis X. Barada was appointed sole trustee of the estate by consent of all parties in interest as well as by the consent of the trustees appointed by the will. Barada was made by a party defendant in this suit for partition. Pending the appeal, he departed this life. No successor, as trustee of the estate, has been appointed and it is suggested by counsel that the appeal should be held in abeyance until a trustee of the estate of John B. Ghio is appointed and made a party to these proceedings.

BLAND, P. J. (after stating the facts).—Francis X. Barada, trustee, as stated above, was a party to the partition suit, to the judgment and order of sale and the order of distribution. He made no objection to any of the proceedings and made no claim to any portion of the money arising from the sale and if it be conceded that he was a necessary party to the partition

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suit, he is not interested in the order of distribution, and this (the distribution of the proceeds of the sale) being the only question brought up on the appeal for adjudication, we see no reason for delaying the case for the purpose of having a new trustee of the estate appointed and made a party to the appeal. James C. Ghio, Mary Harbaugh, Andrew Barada and Marie Layton are the only parties contesting the order of distribution and for this reason are the only necessary parties to a complete determination of all the issues brought up by the appeal. James C. Ghio, by virtue of the trustee's deed conveying the lands to him, took an undivided one-third interest therein in fee and held the remaining two-thirds as trustee for the residuary beneficiaries of his father's will without power of sale. The purpose of both the grantor and grantee was to give James C. Ghio an undivided one-third interest in the lands, and to incorporate the other undivided two-thirds in the body of the assets of the estate of John B. Ghio, to be held in trust, however, for the benefit of Mary Barada and Mary Cummiskey. The respondents claim that by decree of June 3, 1893, of the circuit court, appellant was removed as trustee in this deed and Francis X. Barada substituted trustee in his stead. The decree appointed Barada trustee under the will and ordered that he should "become and stand possessed and clothed with all the estate, interest, rights and powers, and be subject to and charged with all the duties, liabilities and obligations in respect of the trust estate hereinabove designated and described, as trustee for, under and in conformity with the provisions of the last will and testament of John B. Ghio, deceased." It is further provided by the decree that the trustees appointed by the will should deliver to Barada all the personal property of the estate and "also surrender the charge of the real estate aforesaid (described in the decree) unto said Barada," and that upon making such surrender of real estate and de-

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livery of personal property, the trustees under the will should "be and remain fully, finally and forever discharged and acquitted of and from any and all liabilities on account of any and all matters, affairs and things whatsoever touching, growing out of, or concerning said trust or the administration or conduct thereof." As a part of the real estate of the estate of John B. Ghio, the decree specifically mentions and describes the land known as the "Gates farm," in St. Louis county, Missouri, and correctly refers to the deed made by William Booth, trustee, to James C. Ghio, as of date May 30, 1889, and recorded in the records of said county in Book 40, p. 513.

After reciting apt provisions of the will of John B. Ghio, the loan of the ten thousand dollars to Gates and that the same was a part of the trust fund, the taking of the deed of trust to secure the loan, the default of payment, the sale under the deed of trust by the trustee and the purchase by James C. Ghio, the deed reads:

"Now, therefore, this deed witnesseth, that the said James C. Ghio is to have and hold said described property in the following manner: One-third undivided to himself and his heirs forever, to be disposed of as he sees fit. One-third undivided to the use of said Mary Barada and her children, and one-third undivided to the use of Mary O. Cummiskey as provided for in the will of said Ghio, as part of the residue or personalty of his estate, said last undivided two-thirds being subject to sale and conveyance only by the trustees under said will as hereinafter provided for, and further provided that as it may become necessary and expedient in the opinion of the trustees under the said will of Ghio to sell the undivided one-third of Mary Barada and her children, and the undivided one-third of said Mary O. Cummiskey, in said described real estate, for the purpose of once more rendering the same into money as it was in their hands when they made

the said loan of $10,000 to said Gates, or so far as two-thirds of the same are concerned, that they, the said trustees, shall have full power and authority at any time hereafter to sell, dispose of and convey the said undivided two-thirds of Barada and Cummiskey in said real estate, or any part thereof, either in the amount of land or undivided interest for any sum or sums they may see fit, and the purchaser or purchasers, at said sale or sales shall take a fee simple title absolute as far as said two-thirds are concerned to said real estate or any part thereof, either in quantity of land or amount of interest on receiving said trustees' deed therefor, free and clear of any trusts whatsoever."

By this deed the interest of the legatees (except Elizabeth Ghio) under the Ghio will, in and to the lands representing a part of the trust estate was distributed in accordance with the terms of the will. James C. Ghio took title in fee to an undivided one-third and held title to the remaining two-thirds as trustee for Mary Barada and her children and Mary O. Cummiskey; his title as trustee to be divested by sale, and conveyance to be made at any time by the trustees named in the will, he being one of them at that time. The deed, in effect, partitioned the lands between the parties in interest, one-third absolutely and two-thirds in trust which trust might be executed at any time by sale to be made by the trustees named in the will, the legal title to the whole being vested in James C. Ghio. There are no apt words in the decree appointing Barada trustee to divest title to the Gates land out of James C. Ghio. There is no clause or terms in the decree divesting title out of Ghio and investing Barada therewith; in the absence of such words indicating an intention to divest and invest title the decree cannot have that effect. [McKinney v. Settles, 31 Mo. 541; Washburn on Real Property, sec. 2087.] And we do not think the decree has any other effect in respect

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to these lands than to substitute Barada as trustee for the purpose of making sale according to the provisions of the deed. This seems to have been the view of the trial court as the interlocutory decree (unappealed from) found that James C. Ghio held one-third of the lands as trustee for Mary Barada and her children and one-third as trustee for the children of Mary Cummiskey.

There is evidence in the record tending to show that James C. Ghio and Barada acted in conjunction in the employment of counsel and in the conduct of the defense of the ejectment suit, and Barada testified that he notified all the parties in interest of the pendency of the suit. There is no evidence, however, that they were consulted about the employment of counsel or the conduct of the defense to the suit or that they or anyone of them ever expressedly assented to any of the steps taken in the defense. On the other hand, there is no evidence that they ever interposed any objections to the counsel employed by Ghio and Barada or to the conduct of the defense. For the reason they did not expressly assent to the employment of the counsel or to the defense of the suit, it is contended they are not bound to contribute toward the expense of the litigation. That the defense was made in good faith is not controverted. That James C. Ghio held one-third of the lands in fee and the remaining two-thirds as trustee for the respondents is an adjudicated fact in this identical case. Now, while we think it was the duty of Barada, as trustee of the estate, to pay some attention to the defense of the ejectment suit, which the evidence shows he did, the position of James C. Ghio, as part owner, and trustee of the remaining part, made it imperative on him to protect the interest of the *cestui que trust.* Having done this in good faith, should the respondents share their reasonable portion of the expense, is the question presented for solution. It is well to note in this connection that the

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evidence shows the respondents received two-thirds of all the rents that accrued during the life of the lease to the Seiberts, most of which accrued pending the ejectment suit. The claim of appellant for contribution is an equitable one set forth in his answer and cross-bill. The jurisdiction of the circuit court in partition proceedings to equitably adjust the claims of the parties in interest is settled by the cases of Holloway v. Holloway, 97 Mo. 628, 11 S. W. 233; Real Estate Sav. Inst. v. Collonious, 63 Mo. 290; Pratt v. Clark, 57 Mo. 189; Stewart v. Caldwell, 54 Mo. 536, and Spitts v. Wells, 18 Mo. 468. And we think the rights of appellant and respondents to the fund arising from the sale of the land ought to be adjudicated on equitable principles.

In Trustees v. Greenough, 105 U. S. 527, it is said: "One jointly interested with others in a common fund, who, in good faith, maintains the necessary litigation to save it from waste and secure its proper application, is entitled in equity to the reimbursement of his costs as between solicitor and client, either out of the fund itself, or by proportionate contributions from those who receive the benefit of the litigation." This case was followed in Central Railroad & Banking Company v. Pettus, 113 U. S. 116.

Pomeroy, in his work on Jurisprudence, at section 1085, says: "The trustee is entitled to be allowed, as against the estate and the beneficiary, for all his proper expenses out of pocket, which include all payments expressly authorized by the instrument of trust, all reasonable expenses in carrying out the direction of the trust, and, in the absence of any such directions, all expenses reasonably necessary for the security, protection, and preservation of the trust property, or for the prevention of a failure of the trust. He is also indemnified in respect of all personal liabilities incurred by himself for any of these purposes."

Perry on Trusts (5 Ed.), sec. 485, says: "A trustee may reimburse himself for money advanced in

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good faith for the benefit of the *cestui que trust*, or for the protection of the property, or for his own protection in the management of the trust.''

In Downing v. Marshall, 37 N. Y. 380, it is said: ''So far as trustees incur expense in managing trust property, they are entitled to be reimbursed from the trust fund. Reasonable attorney's and counsel fees connected with the management of the business of the trust, will be allowed as a part of the expenses.''

When the ejectment suit was brought, James C. Ghio had the alternative to let judgment go by default and lose the property or to defend the suit in his own behalf and on behalf of the *cestui que trust*. He judiciously chose to make a defense. To make a defense, employment of counsel was indispensable and when the judgment went against the defendant in the circuit court, to avoid an ouster of the tenants, it was necessary to give a supersedeas bond pending appeal to the Supreme Court. The counsel employed by him earned and were entitled to their fees. Rents and profits accumulated pending the appeal had to be paid. These counsel fees and rents and profits James C. Ghio was obliged to pay. He paid for himself and for the other parties interested in the lands, and on both principle and authority, it seems to us, that having thus paid out his own money to protect the trust fund or property as well as his own interest, he had a right to look to the trust property for a proportionate reimbursement, that is, for reimbursement of two-thirds of the amount he was out. But the distributive shares of the respondents in the fund are insufficient to meet this demand and appellant asks not only for the whole of the trust fund represented by the distributive shares of respondents arising from the partition sale but for personal judgments against the respective respondents for balances over and above each of their distributive shares. In the absence of any agreement, express or implied, to reimburse appellant, we do not think that he is entitled

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in this proceeding to look to the *cestui que trust* individually for reimbursement but is confined to the trust property.

The judgment is reversed and the cause remanded to be proceeded with as herein indicated. All concur.

WEST, Appellant, v. BANK OF CARUTHERSVILLE, Respondent.

St. Louis Court of Appeals, February 21, 1905.

1. **PRACTICE: Jury Trial: Waiver.** The appellate court will not consider an assignment of error on the part of the trial court in failing to submit certain issues to the jury, where the record fails to show that a jury was demanded.

2. **REFERENCE: Report of Referee: Judgment.** In a case in which a compulsory reference could be ordered by the court, the court has power to act upon the referee's report of the evidence, without a retrial of the issues, and, upon a hearing of the exceptions to the report, may enter judgment contrary to the one rendered by the referee.

3. **WEIGHT OF EVIDENCE.** In an action by a depositor against a bank for an amount alleged to be due, the evidence is examined and held sufficient to support a finding in favor of the defendant.

Appeal from Pemiscot Circuit Court.—*Hon. Henry C. Riley*, Judge.

AFFIRMED.

Ely & Kelso for appellant.

(1) We are of the opinion that upon the record in this case as already presented that the report of the referee was in the nature of a verdict of a jury. And

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if the report has been confirmed by the court, then judgment could have been rendered thereon in the same manner and with like effect as upon a special verdict. But we do not believe that a proper interpretation of section 715, Revised Statutes 1899, will give the trial court the right, in a case like this one, to sustain the exceptions and render judgment contrary to the report of the referee. And we believe that the court will agree with us that the doctrine announced in the case of Hardware Co. v. Wolter, 91 Mo. 485, affords no authority for the action of the trial court in this cause. We are of the opinion that this statute means that the court may enter judgment on the facts found by the referee, but it furnishes no authority in a case like this to ignore the report of the referee, render a judgment against the finding of the referee without making any finding and without a hearing of the matter. R. S. 1899, sec. 715; 62 Mo. 202; 73 Mo. 187. (2) We are of the opinion that the court erred in refusing plaintiff the right of a jury trial in this cause. The report of the referee found that the question in dispute was narrowed down to whether or not two vouchers should be charged against plaintiff's account. And plaintiff requested a jury to pass on the question as soon as the court indicated he would sustain the exceptions. Plaintiff had a right to waive any further claims and submit his case to a jury on the two vouchers. Hardware Co. v. Wolter, 91 Mo. 480, 3 S. W. 865.

Faris & Oliver for respondent.

(1) The trial court upon exceptions filed by defendant to the report of the referee recommending a finding in favor of plaintiff, may sustain such exceptions and enter up judgment for defendant, if the evidence taken before the referee warrants such finding by the court. Tobacco Co. v. Walker, 123 Mo. 671, 27 S. W. 639; State ex rel. v. Hurlstone, 92 Mo. 327, 5 S. W.

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38; Small v. Hatch, 151 Mo. 306, 52 S. W. 190; Williams v. Railroad, 153 Mo. 495, 54 S. W. 689; Utley v. Hill, 155 Mo. 276, 55 S. W. 1091; Bond v. Finley, 74 Mo. App. 25; Cohill v. McCornish, 74 Mo. App. 612; Raines v. Lumpee, 80 Mo. App. 203; Roth v. Wire Co., 94 Mo. App. 267, 68 S. W. 594. (2) In the case of Wentzville Tobacco Co. v. Walker, supra, upon the question of whether the trial court may set aside the recommendation of the referee, and render final judgment from the evidence preserved, Judge BARCLAY says: "This should now be taken as settled law," in cases where under the law the facts and the issues made by the pleadings, the trial court might lawfully direct a compulsory reference. This case is conceded to be, and clearly is, such a case. It involved a "long account"—more than 300 items. Welsh v. Dorragh, 52 N. Y. 590; Smith v. Haley, 41 Mo. App. 613; R. S. 1899, sec. 698; Bank v. Owen, 101 Mo. 558, 14 S. W. 710; Johnson v. Blell, 61 Mo. App. 37. (3) On the point raised by appellant that "the court erred in refusing plantiff the right of a jury trial in this cause," respondent suggests and contends: (a) That there is no showing or entry in the record that appellant requested a jury at any stage of the proceedings below. While, in the ordinary case at law, this fact, under section 693, Revised Statutes 1899, would be against rather than in favor of respondent's position, it becomes pertinent in the light of what is further suggested below herein. Drainage Dist. v. Campbell, 154 Mo. 151. (b) That the record shows that appellant was present, or represented by his counsel, where this reference was had, and that he made no objection, nor took any exceptions to such reference. Can he now be heard to object? Callahan v. Shotwell, 60 Mo. 398; Young v. Powell, 87 Mo. 128; Vining v. Ins. Co., 89 Mo. App. 311; Sheppard v. Bank, 15 Mo. 144; Edwardson v. Garnhart, 56 Mo. 81; Ice Co. v. Tamm, 138 Mo. 385, 39 S. W. 791. (4) This court will assume, in the ab-

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sence of this evidence and these showings, that the trial court decided this case correctly, from all the evidence before it. McCullough v. DeWitt, 163 Mo. 306, 63 S. W. 694; Doherty v. Noble, 138 Mo. 32, 39 S. W. 458; Deering v. Hannah, 93 Mo. App. 618, 67 S. W. 714; Ely v. Coontz, 167 Mo. 371, 67 S. W. 299.

GOODE, J.—As this action was instituted it was for $5,107.18, alleged to be due the plaintiff as the difference between the aggregate of sums of money he had deposited in the defendant bank and the sums he had withdrawn. Plaintiff began business with the bank July 11, 1900, and closed his account June 15, 1901. During this time his deposits amounted to $41,099.25, and he admitted checking out at various times $35,992.11. The answer admitted plaintiff had deposited $39,730.84, but alleged the entire sum had been paid out on orders and checks drawn by the plaintiff. The litigation, therefore, involved very numerous transactions and the examination of the books of the bank and the pass books and vouchers of the plaintiff for nearly a year. The circuit judge referred the case to a referee, whether by consent or on his own motion, is not disclosed. At all events, the case was one permitting a compulsory reference. In his report the referee found all the various items arising from the business transacted between the parties except two, against the plaintiff. One of these was a debit against plantiff on the books of the bank December 10, 1900, for $1,000; the other was a debit of $100 dated November 17, 1900. These two items the referee found to have been charged to the plaintiff by mistake and recommended a judgment in his favor for the amount of them. Exceptions were filed by the bank to the referee's report and sustained by the court. With the report of the referee a complete transcript of the evidence taken before him was filed, and on this evidence

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the court entered judgment for the defendant. The plaintiff appealed.

1. It is urged that the court, after sustaining the defendant's exception to the report of the referee, should have granted plaintiff a trial by jury of the issue touching the two items found by the referee in his favor. Suffice to say as to this positon, that the record fails to show a jury was demanded, and on the contrary, does show the case was submitted to the court.

2. Error is assigned because the court rendered judgment on the transcript of the evidence taken before the referee, instead of retrying the cause after the defendant's exceptions were sustained. As this was a case in which a compulsory reference could have been ordered by the court, the court had power to act on the referee's report of the evidence and enter judgment contrary to the one rendered by the referee. [Wentzville Tobacco Co. v. Walker, 123 Mo. 662, 671, 27 S. W. 639; Caruth v. Wolter, 91 Mo. 484; 3 S. W. 865; State ex rel. v. Hurlstone, 92 Mo. 397, 5 S. W. 38.]

3. The evidence is all before us and it is insisted the judgment below was not justified and that we ought to enter judgment for the plaintiff on the merits. An attentive perusal of the testimony has failed to yield a conviction in plaintiff's favor so positive that we would feel justified in changing the result. A brief epitome of the evidence bearing on the two items will disclose why we refrain from doing so. As has been stated, the plaintiff's account with the bank extended over nearly a year, involving numerous transactions and considerable sums of money. The plaintiff was in the mercantile business at the town of Pascola, some fifteen miles from Caruthersville. During all his dealings with the bank he kept a pass book. He had three pass books in that period, a new one being furnished when he claimed to have mislaid the one previously used. The pass book in use was balanced regularly and returned to him with all vouchers and checks. His book was balanced Janu-

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ary 1, 1901, and the two items in dispute on this appeal —that is, those of the dates of December 10, 1900, and November 17, 1900—were included in that statement of his account, as the last prior statement was rendered October 24, 1900. West admits he made no complaint about his account as shown on his balanced pass book, until June 10, 1901, more than six months afterwards. He gives no explanation of why he was silent, and his silence is the more significant in that he testified a man named Friant and he had worked over the book and Friant said that he (West) "was being hogged." Moreover, it appears that West's account with the bank was overdrawn frequently, he was notified to make the overdrafts good and did so several times after the alleged shortage, without protesting that his account was short $1,000 or $1,100. He complained in June or July, 1901, after he had discontinued business with the bank and sold out his mercantile establishment. He sold this establishment to a man by the name of Stephens, June 20, 1901. About that time one of West's checks on the Bank of Caruthersville went to protest and he told Stephens about it, saying he knew he had no money in the bank at the time, but did not think Mr. Talley (the cashier) would turn him down or protest his check. The debit of $1,000 probably arose in this way; West was in the habit of going to the bank every month and getting about that sum to pay the wages due Friant's employees. Friant did business with West at Pascola and West paid his hands on the tenth of the month. That is to say, West advanced the money to Fraint and borrowed it from the bank to make the advance. He usually repaid the bank in a day or two, and for this reason the loan was carried not as a bill receivable on the books of the bank, but as a cash item. That is, as the loan was only to run for a few days, it was treated as cash. Sometimes West gave a receipt for it and sometimes a note; but in either case it was treated as cash in the expectation that it would be paid in so short a time that

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it was useless to charge it among the bills receivable. West swore he did not get a loan December 10, 1900 and did not know anything about a loan of that date until he quit business with the bank. When his pass book was balanced in 1901, he was overdrawn $100, but says the fact that this $1,000 had been unjustly charged to him in December, 1900, did not attract his attention. His reason for knowing he gave no note and made no loan on December 10, 1900, was that he got some money on that day from Hayti. The impression left on our minds is that this $1,000 charge was correct. Talley, the cashier, swore positively that though West complained in June, 1901, after he had quit business with the bank, of an error in his account, he said nothing about this particular item. When Talley testified he no longer had any interest in the bank.

The debit for $100 is evidenced by a receipt signed by West, dated November 17, 1900, with a notation on the receipt: "Sent out by Forbes." Forbes was a conductor on a railroad which ran from Caruthersville to Pascola and occasionally West had him draw money out of the Bank of Caruthersville and bring it to West's store. The contention in regard to this item is that West failed to meet Forbes at Pascola the day the latter brought the money called for by the item; so Forbes took the money back to Caruthersville and returned it to the bank. It is not denied that such an incident occurred once; but the bank insists that the returned loan was not the same loan obtained November 17, 1900, but was money borrowed at another time; and that the debit slip for that money was destroyed without the loan being put on the books against West. The evidence in regard to this item leaves a doubt in our minds as to what the truth is; hence we do not feel justified in interfering with the finding below.

The judgment is affirmed. All concur.

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STONEBRAKER, Respondent, v. CHICAGO & ALTON RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, February 21, 1905.

1. **RAILROADS: Killing Stock: Prima Facie Case.** In an action against a railroad company for damages on account of killing plaintiff's mare, under a statute allowing compensation to owners of stock killed by an engine or train, evidence that the mare was found lying on the right of way near the track with her head badly bruised and one eye knocked out of its socket, is sufficient to support a finding that the mare was killed by an engine or train.

2. **FOREIGN STATUTE: Remedial Statute.** A statute of another State, allowing single damages against a railroad company as compensation for killing stock, is not penal but remedial and may be sued on in this State.

3. **PLEADING: Variance: Special Act of Negligence.** In an action against a railroad company for killing plaintiff's mare, under a statute allowing damages to owners of stock killed by an engine or a train at any point along the right of way where the right of way is not fenced as required by law, a petition which alleges negligence in failing to construct and maintain a lawful fence is not supported by proof that the mare got upon the right of way by coming through a gate which was left open an unreasonable time—the gate and fence being lawfully constructed under the statute.

Appeal from Louisiana Court of Common Pleas.—*Hon. David H. Eby*, Judge.

REVERSED AND REMANDED.

Scarritt, Griffith & Jones for appellant.

(1) The Illinois Act which is the basis of this suit is a penal statute, a police regulation. Railroad v. Warrington, 92 Ill. 157; Railroad v. Jacksonville, 67 Ill. 37; Railroad v. Russell, 115 Ill. 52. (2) It is

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held by the courts both of Missouri and of Illinois that penal statutes are local and not enforceable outside of the jurisdiction enacting them. Kimball v. Davis, 52 Mo. App. 212; Tel. Co. v. Bank, 74 Ill. 217; Sherman v. Gassett, 4 Gilm. (Ill.) 521; Barnes v. Whittaker, 22 Ill. 606; 16 Ency. Pleading and Practice, 248. (3) The demurrer to the evidence should have been sustained by reason of the failure of plaintiff to prove that his horse was killed by actual collision with one of defendant's trains. Stump v. Railway, 84 Ill. App. 28; Schertz v. Railway, 117 Ill. 577; Hesse v. Railway, 36 Mo. App. 163. The court erred in giving plaintiff's instruction "A." By plaintiff's instruction "A." the jury were told that if they believed that the statute of Illinois in question was then in force, "and that defendant failed to comply with the provisions of said statute, and that by reason of such failure of defendant plaintiff's horse got upon defendant's railroad and was thereby killed, your verdict must be for the plaintiff." This instruction is erroneous, in that it leaves the construction of this statute to the jury, whereas its interpretation is a question of law for the court. (4) Instructions should be based upon the pleadings. Plaintiff cannot allege negligence in one respect and recover for negligence in a different respect. Gessley v. Railway, 26 Mo. App. 156; Kenny v. Railway, 70 Mo. 252; Hassett v. Rust, 64 Mo. 325; Abbott v. Railroad, 83 Mo. 271. This instruction is further erroneous in that it permits plaintiff to recover if his horse was killed *in any manner* upon defendant's right of way, while, in law, his right to recover depended upon the horse being killed by an actual collision with a railroad train.

Matson & May for respondent.

(1) Under the act of April 20, 1891, a plaintiff may maintain in the courts of this State suits upon

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any cause of action that may have been accrued to him under the law of any other State. Riley v. Receivers, 72 Mo. App. 280. In the above case the court further says: "Whatever now may have heretofore been the rule of comity between the States as to the enforcement of causes of action accruing in foreign jurisdictions the statutes above quoted settle the rights of the parties here, and unquestionably establish the right of plaintiff to maintain this action." Jones v. Railway, 178 Mo. 528, 77 S. W. 890; Hudson v. Railway, 53 Mo. 525. The statute authorizing judgment against a railroad company for killing stock is compensatory in giving the owner of animals injured the right to recover the damages sustained, and in this regard is to be construed like any other statute. Parish v. Railroad, 63 Mo. 284. (2) The statute for recovery of single damages against railroad companies for the killing of stock does not provide for an exclusive remedy but is cumulative and does not displace the common law in the situation to which it applies, and under a general allegation of negligence, the plaintiff may succeed either by proving negligence at common law or by proving the constructive statutory negligence. The plaintiff can, under an allegation of negligence at common law make out a case by giving either evidence which would be evidence of negligence at common law, or evidence which is made presumptive evidence of negligence under the statute. Hill v. Railway, 49 Mo. App. 526, 66 Mo. App. 184, 121 Mo. 477; Hurley v. Railway, 57 Mo. App. 675. (3) If an animal comes upon the track of a railroad and is killed, when such track might be lawfully fenced, the railway company is liable regardless of the question of negligence. Vanderworker v. Railway, 51 Mo. App. 166; Biglaw v. Railway, 48 Mo. 510; Smith v. Railway, 91 Mo. 58, 3 S. W. 836.

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GOODE, J.—This is an action for the value of a mare alleged to have been killed by an engine of the defendant company. The cause of action originated in the State of Illinois and is founded on a statute of that State giving single damages to the owners of stock killed by an engine or a train of a railway company at any point along the line where the right of way is not fenced as required by law. It is said there was no evidence to show that the mare was struck by a train, which must have been shown to bring the case within the Illinois statute. The mare was found lying on the right of way near the track, with her head badly bruised and one eye knocked out of its socket. This and other facts in proof were sufficient in our judgment, to support a finding by the jury that the mare was killed by an engine or train.

It was said that the statute was a penal one and not enforceable outside the State of its enactment. Decisions of the Supreme Court of Illinois are cited on the proposition. The statute in question allows single damages by way of compensation. The decisions cited refer to a double damage statute. [Railway v. Warrington, 92 Ill. 157; Railway Co. v. Russell, 115 Ill. 52.]

The petition avers that the place where the animal went on the railway right of way and where it was killed, was not a point where the railroad was enclosed by a lawful fence. We will quote the language used:

"That at the place at which plaintiff's said animal went upon the said railroad; to-wit, near said Quincy Junction, in said Pike county, Illinois, and where it was injured and killed by the engine and cars on said railroad, was not at a point where the railroad was enclosed by a lawful fence, not at the crossing of any public road or highway, nor within an incorporated city, town or village; that said animal was injured and killed at a place where the defendant

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might lawfully have erected and maintained fences on the sides of said railroad, and constructed cattle-guards sufficient to prevent animals from getting on the railroad, but defendant had failed and neglected to construct and maintain fences, gates and cattle-guards at said place, as required by said statute of the State of Illinois."

Testimony was elicited at the trial which tended to show the mare went on the track through an open gate at a place where the right of way was lawfully fenced, instead of where no fence had been constructed and maintained. This evidence was objected to because the petition did not allege the gate was left open. On this evidence the jury was instructed, in substance, that the statute required the defendant to maintain fences with gates therein at farm crossings and that the gates were part of the fences; that it was part of the statutory duty of the railroad company to maintain the gates in repair and keep them closed so as to protect stock from getting on the track through them as well as at other places, and if the jury believed the horse got on the track through the gate and the gate was left standing open so long before the accident that the defendant knew it was open, or by the exercise of ordinary care could have discovered it was in time to close it before the mare went through, and that by reason of the defendant's neglect to close it, the mare got on the track and was struck and killed by an engine, the defendant was liable. That instruction is assailed as erroneous because it allowed a verdict for the plaintiff outside the allegations of the petition. It is said the petition counts, not on the negligence of the defendant in leaving the gate open where the right of way was enclosed lawfully, through which open gate the mare passed on the right of way, but on a failure to construct and maintain a lawful fence where the mare went on track. This point has merit. Plaintiff's petition not only contains no averment of facts

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to constitute a case based on the negligence of the railroad company in leaving a gate open an unreasonable time where the right of way was enclosed by a lawful fence, but excludes the supposition that the mare entered at a gate in the fenced portion of the track. Letting the right of way remain unfenced or badly fenced, affords a case for damages for stock killed by a train as the result of a railway company's default. So does neglect in letting a gate stand open where a good fence is maintained. But the two causes of action call for proof of facts to support them so different that the statement of either cause is no notice to a defendant that the other will be relied on for a verdict, but is impliedly notice that it will not be. How can a company sued for killing stock which went on the track where there was no fence or an insufficient one, anticipate proof that the stock entered through an open gate where the track was well enclosed? In preparing to defend against a charge of not fencing, the company would look for evidence to show it maintained a fence in good order at the designated portion of its right of way; whereas, to clear itself of the charge of negligently leaving a gate open it would need no such evidence, but, instead, evidence of entirely different facts. The instruction complained of submitted an issue incompatible with the issues tendered in the petition. It was prejudicial to the defendant and, as the pleadings stood, erroneous. [Gessley v. Railroad, 26 Mo. App. 156; Schawacker v. Dempsey, 83 Mo. App. 342.] This very question was passed on in Illinois, etc., Railroad v. McKee, 43 Ill. 119. The animal killed in that case got on the railway company's track through a gate at a farm crossing said to have been negligently left open. The declaration merely averred the railroad company neglected to maintain and keep in repair its fences on the right of way and by reason thereof the horse strayed on the track and was killed. There was no allegation that the gate

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through which the horse entered was not kept closed. Nevertheless, the court permitted a recovery for negligence in the latter regard and refused to instruct, as requested by the railroad company, that there could be no recovery on that ground. Besides, evidence that the gate was negligently left open was admitted over the objection of the company. The opinion said the gravamen of the action was neglect to keep the fence in repair, and was not maintained by proof that a gate was carelessly left open; that leaving the gate open was a good cause of action, but entirely different from one for failing to maintain a good fence. In the case at bar not only was the instruction whose substance we have stated, given, but one excluding a recovery on the ground that the plaintiff's mare entered the right of way through an open gate, was refused. We are cited to two decisions in this State supposed to justify the ruling of the circuit court. [Duncan v. Railroad, 91 Mo. 67, 3 S. W. 835, and Woods v. Railroad, 51 Mo. App. 500.] In this State as in Illinois, the statute provides for the construction and maintenance along railroads of good gates, as well as fences, and the gates are regarded as part of the fences. [Morrison v. Railroad, 27 Mo. App. 418; Wabash Railway v. Perfex, 57 Ill. App. 62.] It is the duty of a railroad company to use reasonable diligence to keep the gates along its right of way securely closed. [Woods v. Railroad, supra; Peoria, etc., Railway v. Babba, 23 Ill. App. 459; Railroad Co. v. McKee, supra.] The Duncan and Woods cases enforce the duty of railroad companies to maintain gates, as well as fences, in good repair, and hold that on a complaint that a railroad company failed to maintain lawful fences, cattle-guards, gates and openings, the plaintiff may prove a failure either to maintain a proper fence, gates or cattle-guard, in consequence of which his animal got on the track and was killed, and that proof of either would entitle him to a verdict. In each case a gate

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was out of repair and, in consequence of its defective state, the animal killed got through it on the right of way. As the gate was part of the railroad company's fence, letting it be out of repair was letting the fence be out of repair. To ascertain whether those cases furnish the rule of decision for this one, we must bear in mind that the gate in question was not out of repair, nor is the contention preferred that it was. It was in good order. The position of the plaintiff is that it was carelessly left open by the servants of the railroad company an unreasonable time and in consequence of that neglect his mare went through it and was killed. We do not understand the above cases to hold such proof is admissible under an allegation of failure to fence or to maintain a good fence. If the gate had been out of order and the mare got through it because it was out of order, these facts would support an averment that the defendant company had failed to maintain a good fence; but as the gate was in perfect condition, the only dereliction shown in regard to it was carelessly leaving it open. We think the case stated was in no way supported by that fact.

The judgment is reversed and the cause remanded. All concur.

CITY OF DONIPHAN, Appellant, v. WHITE et al., Respondents.

St. Louis Court of Appeals, February 21, 1905.

1. **MUNICIPAL CORPORATIONS: Validity of Ordinance: Cattle.** Under section 5959 of the Revised Statutes of 1899, a city of the fourth class has power to both regulate and restrain the running of cattle at large within the corporate limits.

2. ——: ——: **Regulating Cattle.** And under the power to regulate, an ordinance prohibiting cattle with horns from running at large was valid and not an unreasonable discrimination between the owners of cattle with horns and cattle without horns.

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Appeal from Ripley Circuit Court.—*Hon. Jas. L. Fort,* Judge.

REVERSED AND REMANDED.

J. M. Atkinson for appellant.

(1) Section 5959, Revised Statutes 1899, gives a direct and specific power to cities of the fourth class to "regulate" and "restrain" cattle from running at large within their corporate limits, and authority to enforce such powers by impounding such cattle, and also providing penalties for the owners who shall permit such cattle to run at large in violation of such restrictions. (2) The specific power to "regulate" gives the city the right to make police regulations as to the mode in which the designated employment shall be exercised. St. Louis v. Tel. Co., 96 Mo. 631, 10 S. W. 197; 1 Dill. on Mun. Cor. (3 Ed.), sec. 358. (3) The police power to "regulate" is entitled to liberal construction, and is largely within the discretion of the council, and not subject to judicial interference. Smith on Mun. Cor., sec. 1322. "That a large and liberal discretion is to be allowed to municipal authorities, is conceded." Cape Girardeau v. Riley, 72 Mo. 224; Tarkio v. Cook, 120 Mo. 9, 25 S. W. 202; St. Louis v. Galt, 179 Mo. 18, 77 S. W. 876; Springfield v. Starks, 93 Mo. App. 77; 1 Dill. on Mun. Cor. (3 Ed.), sec. 402; St. Louis v. Howard, 119 Mo. 46, 24 S. W. 772. (4) Appellant city having the absolute power to prohibit cattle from running at large, can make the conditions on which cattle will be permitted to run at large, and it does not lie in the mouth of respondents to say that such regulations are unreasonable, and such absolute power even if the power to "regulate" were not given, is not limited to saying "yes" and "no." Railroad v. Kirkwood, 159 Mo. 252; St. Louis v. Fischer, 167 Mo. 662, 67 S. W. 872; Fischer

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v. St. Louis, 24 U. S. 673; Railroad v. Railroad, 105 Mo. 571, 16 S. W. 920. (5) The objection made to the ordinance in dispute, that it is "unreasonable," cannot be maintained by respondents, in the light of the decision of the appellate courts of this State. Skinker v. Heman, 148 Mo. 349, 49 S. W. 1026; St. Louis v. Wbeer, 44 Mo. 550. The power to regulate and prohibit cattle from running at large within appellant city, being a police regulation for the protection and safety of the citizens of appellant city, is not subject to the objection that said ordinance is void on the ground that it discriminates between cattle with horns and those without horns. State v. Tie and Timber Co., 179 Mo. 245, 80 S. W. 941; State v. Cantwell, 78 S. W. 569.

Dinning & Hamel, T. F Lane and *Alf. Perkins* for respondents.

(1) The power of the city to pass the ordinance in question must be derived from section 5959, Revised Statutes of Missouri, or it must be based on the "General Welfare" clause of section 5957, Revised Statutes 1899. Where the charter in general terms authorizes the corporation to abate nuisances, but also contains a special provision enabling it to regulate and prohibit animals from running at large, any ordinance designed for the regulation of animals from running at large must rest upon the special power granted, and not upon the general provision. Dillon on Mun. Cor. (1 Ed.), sec. 250 and notes; 2 Smith on Mun. Cor., sec. 1320; Johnson v. Daw, 53 Mo. App. 372; Springfield v. Starke, 93 Mo. App. 70. (2) It is further contended that the ordinance in question is void for the reason that it is a special law or class legislation. "A statute which relates to persons or things as a class is a general law, while a statute which relates to persons or things of a class is a special law." Dunne v. Railroad, 131 Mo. 5, 32 S. W. 641. (3) Said

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ordinance is void because it makes an unreasonable and unwarranted discrimination between cattle with horns and cattle without horns running at large within the corporate limits of said city. State v. Loomis, 115 Mo. 307, 22 S. W. 350; State v. Julow, 129 Mo. 163, 31 S. W. 871; Cooley on Const. Lim. (6 Ed.), secs. 430, 434; 2 Story on Const. (5 Ed.), secs. 1590, 1943; Bank v. Okeley, 4 Wheat. 235; Wally's Heirs v. Kennedy, 2 Yerg. 554; Commonwealth v. Perry, 28 N. E. 1126; Godcharles v. Wigeman, 113 Pa. St. 431; State v. Goodwill, 33 W. Va. 188; Millett v. People, 117 Ill. 294; Frover v. People, 141 Ill. 171; Ritchie v. People, 155 Ill. 98; In re Jacobs, 98 N. Y. 98; People v. Gillson, 109 N. Y. 389; Tilt v. People, 27 Ch. Leg. News 270.

GOODE, J.—These respondents were complained against before the mayor of the city of Doniphan for permitting a cow with horns to run at large within the corporate limits of the city contrary to the provisions of an ordinance which provided that it should be unlawful for the owners, agents or keepers of a cow, bull, heifer or steer to permit the same to run at large within the city unless the animal was dehorned or a natural muley. The respondents were convicted before the mayor and took an appeal to the circuit court where, on a trial of the case, the ordinance was excluded from the evidence and a declaration in the nature of a demurrer to the appellant's case given. The circuit court held that the city of Doniphan had no power to pass the ordinance in question, and the respondents endeavor to sustain this ruling on the ground that the ordinance created an unlawful discrimination between the owners of cattle with horns and the owners of cattle without horns. Doniphan is a city of the fourth class. The Revised Statutes contain a specific grant of power to such cities to regulate and restrain the running at large of cattle within the corporate limits and to provide penalties against owners who shall violate a

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measure adopted by the city to regulate and restrain cattle. [R. S. 1899, sec. 5959.] Power is given both to regulate the running at large of cattle and to restrain them. The ordinance with which we are concerned is a regulation of the matter pursuant to the granted power. It prohibits the running at large of cattle with horns, but permits muley and dehorned cattle to do so. The obvious reason for this legislation is that in the judgment of the city authorities, cattle with horns were considered dangerous to people on the streets, and perhaps to young trees; while those without horns were not. This was a matter within the discretion of the council. That body had power to prohibit all cattle from running at large, or they might restrain only such animals as, in reason, could be considered dangerous to persons or property. Horned cattle are more dangerous than those without horns, and if the council saw fit to permit one class to be on the streets, while prohibiting the other class, it could do this by virtue of the grant of power contained in the statutes. No case like this has been cited, nor have we found one; but according to those general principles which control the exercise by a municipality of a power granted in its charter to enact legislation on a specified subject for the purpose of promoting the health, safety and welfare of the community, the ordinance before us seems to be valid. We can not say the discrimination between the two kinds of cattle was arbitrary, capricious or unreasonable. One kind might do mischief and the other not. As the ordinance was founded on a power expressly granted and deals with the very matter of the grant—the regulation of the running at large of cattle—its invalidity, when tried by some established principle of law, would have to be clear, for us to annul it. [Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202; St. Charles v. Elsner, 155 Mo. 671, 56 S. W. 291.]

The judgment is reversed and the cause remanded. All concur.

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MONROE, Respondent, v. HERRINGTON, Appellant.

St. Louis Court of Appeals, February 21, 1905.

1. **LIMITATIONS OF ACTIONS: Note: Endorser: Payments by Maker.** The payments by the maker of a note do not defer the running of the Statute of Limitations in favor of the endorser of the note, since the cause of action against him is based on his independent contract created by the endorsement.

2. ——: ——: **Written Acknowledgment or Debt.** A letter written by the endorser of a note which related to the note, did not postpone the running of the Statute of Limitations, in the absence of an unequivocal acknowledgment of the debt.

3. ——: ——: **Estoppel.** One liable on a note who procures an extension of time by a positive agreement to waive the defense of the Statute of Limitations, is estopped to set it up when sued on the note.

4. ——: ——: **Agreement to Pay.** But a verbal agreement by the endorser to pay whatever remains due after the holder of the note should exhaust his remedy against the deceased maker's estate, on account of which the holder, at the endorser's request, forebore to sue until the statute had run, was a contract within the words of the Statute of Frauds and was not binding upon the endorser.

5. ——: ——: **Estoppel.** Nor would the endorser, when sued on the note, be estopped to assert the Statute of Limitations, because to allow an estoppel in such a case would be an evasion of the statute.

Appeal from Jefferson Circuit Court.—*Hon. Frank R. Dearing,* Judge.

REVERSED.

Sam Byrns and *James F. Green* for appellant.

(1) No payment having been made by defendant Herrington on the note in suit within ten years prior to the date of the institution of plaintiff's suit, there

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can be no recovery. R. S. 1899, sec. 4294; Maddox v. Duncan, 143 Mo. 613, 45 S. W. 688; Regan v. Willams, 88 Mo. App. 577; Corbyn v. Brockmeyer, 84 Mo. App. 653. (2) Nor can defendant Herrington be held liable upon an acknowledgment of the debt. Such acknowledgment to remove the bar of the statute must be in writing and contain an unqualified admission of a present subsisting debt. Wells v. Hargrave, 117 Mo. 568, 23 S. W. 885; Kirkbride v. Gash, 34 Mo. App. 260; Chidsey v. Powell, 91 Mo. 627, 4 S. W. 446; Chambers v. Ruby, 47 Mo. 99; Carr v. Hurlburt, 41 Mo. 267.

L. F. Dinning and *E. J. Bean* for respondent.

(1) The defendant is estopped from pleading the Statute of Limitations in bar of plaintiff's claim on the note. 19 Am. and Eng. Enc. Law (N. E.), p. 288, sec. 16; Dry Goods Co. v. Goss, 65 Mo. App. 55; Railroad v. Cooms, 71 Mo. App. 299; Bridges v. Stevens, 132 Mo. 538, 34 S. W. 555; Holman v. Railroad, 62 L. R. A. 397; Derrick v. Ins. Co., 74 Ill. 404; Newton v. Carson, 5 S. W. 475. (2) Estoppel *in pais* may rise in action at law as well as in equity and the fact that it does arise and become an issue in a proceeding before a justice does not defeat his jurisdicton. Pittman v. Mining Co., 78 Mo. App. 438.

GOODE, J.—Action on the following promissory note:

"$250.00 Hillsboro, Mo., May 4th, 1889.

"One (1) year after date we, or either of us, promise to pay to Millard F. Herrington, or order, the sum of two hundred and fifty dollars ($250) for value received, with interest from date at the rate of ten (10) per cent per annum, and if interest be not paid annually to become as principal and bear the same rate of interest.

"(Signed) MARY A. CRAFT," and eight other names.

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The note was signed on its face by Mary A. Craft and eight other makers. It was indorsed on the back as follows:

"J. H. MORSE,
"HENRY STELBRINK,
"M. F. HERRINGTON.

"I hereby waive demand, notice and protest.

"M. F. HERRINGTON.

"Payments indorsed as follows:

"$112.45, paid 10-29-92
"$104.16, paid 12-17-97
"$ 34.53, paid 5-30-1900."

The first indorsement was by Morse and Stelbrink to Herrington, who held it for about eight months and in May, 1889, indorsed it to the respondent who had purchased it from him. Though the names of Morse and Stelbrink appear on the back of the instrument, we understand they were joint makers. The evidence is rather obscure regarding the origin of the note; but suggests that Herrington advanced the money called for by it in order to prevent the sale of some property in which Stelbrink, Morse and the other makers were interested. The defense is the Statute of Limitations.

It is conceded that the payments credited on the note were not made by Herrington, but by one or more of the joint makers; therefore, as the cause of action against Herrington is based on the independent contract created by his indorsement, to which the makers were not parties, the payments did not defer the running of the statute in his favor from the date of his indorsement. [Maddox v. Duncan, 143 Mo. 613.]

This action was instituted April 9, 1901, more than ten years after the date of Herrington's indorsement. To overcome the defense of the Statute of Limitations, the repondent relies on a letter written by Herrington to respondent's attorney, and said to acknowledge the debt, and on an oral promise by him that if suit was not brought until the estate of Henry Stelbrink was settled,

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appellant would pay the balance then due on the note.

The letter reads as follows:

"De Soto, Mo., 3-21-1901.

"Mr. E. Bean,

"Hillsboro, Mo.

"Dear Sir: When you come down bring that note and all of the credits, or send them to me, as I want to have it figured. The way I got it from you was this: May 4th, '89, note $250 at ten per cent. Paid October 29, '92, $112.45; February 20, '97, $260.41; December 17, '97, $104.16; May 5, 1901, $40.00.

"If I have the dates and amount right except the third payment. I don't think I got that right.

"Yours respectfully,

"M. F. HERRINGTON."

That letter contains no direct and unequivocal acknowledgment of the defendant's liability on the note and no promise, either express or implied, to pay it. If it had acknowledged the note as a subsisting debt against the appellant, it might have been sufficient to postpone the running of the statute without an expression of willingness or intention to pay. [Chidsey v. Powell, 91 Mo. 622, 4 S. W. 446.] The letter relates to the note, but nothing in it can be construed as an admission on the part of the appellant that it was a subsisting debt of his. The language used by the writer shows he was concerned about the note; but we understand that a writing must unequivocally acknowledge the existence of a debt or contain a promise to pay, in order to suspend the statute. As to the point under consideration, this case is like Wells v. Hargrave, 117 Mo. 563, 23 S. W. 885. The debtor in that case wrote a letter to his creditor which contained the following reference to the indebtedness:

"Will make you a statement of what I got of you in land purchases. The amount was two hundred and ninety acres and seventy-six hundredths (298.76) acres

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the price was five dollars per acre or ($1,548.05) fifteen hundred and forty-eight dollars and five cents, all to be due in January, 1869. This statement I make from recollection and pretty sure correct, but I hold the original papers, and cancelled them all in the Texas trade and trip. My intentions are true and faithful, but my abilities are rather cramped now until can sell or make some money otherwise."

That writing was held by both the circuit court and the Supreme Court to be an insufficient acknowledgment of or promse to pay the notes sued on, to take the case out of the statute. The Supreme Court said that to accomplish that purpose the acknowledgment must be in terms so distinct and unqualified that a promise to pay upon request, or at some fixed time, may reasonably be inferred from it; must be clear and explicit, not incumbered by any conditions; that there need not be an express promise to pay provided a clear, distinct and unequivocal acknowledgment of the debt is shown. In Carr v. Hurlburt, 41 Mo. 267, it was said that to take a case out of the statute there should be an express promise to pay or an acknowledgment of an actual, subsisting debt from which the law would imply a promise. In Chambers v. Rubey, 47 Mo. 99, it was held the acknowledgment should contain an unqualified and direct admission of a present and subsisting debt. [See, too, Kirkbride v. Gash, 34 Mo. App. 258.] We think it is plain the defendant's letter did not interfere with the running of the Statute of Limitations against his obligation as indorser of the note.

According to the testimony of the respondent and Mr. Bean, his attorney for the collection of the note, the appellant was anxious that as much money as possible should be realized out of the estate of Henry Stelbrink, who had died in the meantime. They say that at appellant's request, and relying on his promise to pay whatever remained due after respondent had ex-

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hausted his remedy against the Stelbrink estate, the respondent refrained from suing for more than ten years subsequent to appellant's indorsement. In view of these facts it is asserted that appellant is estopped to interpose the Statute of Limitations as a defense. In passing on this proposition it is important to ascertain just what the testimony to support it is. Herrington testified that he never considered the note his debt; but as he had assigned it to Monroe, was interested in seeing that the latter was paid and, therefore, informed him of a certain asset of the Stelbrink estate which the administratrix had failed to inventory. The asset was a brewery bond for $1,000. Munroe swore Herrington told him to get what he could out of Stelbrink's estate and he (Herrington) would pay the balance, at the same time informing him of the brewery bond, which, if it could be reached, would suffice to pay the note. This promise by Herrington to pay any balance left when Stelbrink's estate was settled was given in 1897, and less than ten years after the date of Herrington's indorsement. Bean testified that in various conversations about the note while he was endeavoring to collect it, Herrington asked him not to sue until the Stelbrink estate was settled—to make what he could out of that estate saying he (Herrington) would pay the balance. Bean also testified there was a tract of land belonging to the Stelbrink estate which was to be sold by the administratrix, and Herrington thought he could make enough by buying the land at the sale to reimburse him for what he might have to pay on the note. The sale occurred May 14, 1900, and the estate must have been settled later; consequently when the settlement occurred, ten years had passed since Herrington indorsed the note. In none of the conversations was the Statute of Limitations mentioned or the danger of the note being outlawed. Neither is it contended that the appellant agreed to waive the defense of the statute if the respondent would forbear suing. Making the Statute

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of Limitations part of the subject-matter of their conversations or agreement with reference to the note, was never thought of by either party. The most favorable view of the testimony for the respondent is that appellant asked that no suit be instituted and the Stelbrink estate proceeded against, promising to discharge whatever balance remained unpaid on the note after as much as possible had been obtained from said estate toward paying it. There was no testimony that either the respondent or his attorney agreed not to sue until the estate was settled; though in point of fact the present action was begun after it was settled. But for aught that appears it might have been brought at any time. The question is whether the appellant is estopped to interpose the statute if the respondent refrained from suing, in reliance on his promise to pay, until after the statutory period had elapsed. If there had been a positive agreement to waive the defense of the Statute of Limitations, this question could be answered easily on the authority of Bridges v. Stephens, 132 Mo. 524. In that case it was determined that an agreement not to plead the statute or rely on it as a defense, if the obligee would forbear to sue until the limitation period expired, was valid and would be enforced. There the testimony showed a positive agreement between the parties, the subject-matter of which was the defense of the statute, and a promise by the defendant to waive the defense if the plaintiff would withhold suit on his demand. The agreement was requested by the defendant and acceded to by the plaintiff in the hope of adjusting the claim without litigation. The same proposition has been decided in other jurisdictions and some of the cases are reviewed in the opinion of the Supreme Court in the case mentioned. In most instances, though not always, when a party was precluded from interposing the limitation defense, it was because he had agreed to waive it, which agreement was held to suspend the operation of the statute. [Weber v. Williams College, 23 Pick.

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302; Gaylord v. Van Lohm, 15 Wend. 308; Walker v. Wayne, 23 Maine 453; Benton v. Stephens, 24 Vt. 131; In re King, 94 Mich. 411; Rowell v. Lewis, 72 Vt. 163.] It was decided in Bridges v. Stephens, that an agreement not to plead the Statute of Limitations against a debt is neither an acknowledgment of the debt nor a promise to pay it, but a distinct and separate contract on the part of the debtor. The importance of this distinction is that it enables a court to enforce the agreement to waive the statutory bar without infringing the other section of the limitation act which provides that no acknowledgment or promise shall be evidence of a new and continuing contract whereby to take a case out of the operation of the Statute of Limitations, or deprive a party of its benefits, unless the acknowledgment or promise be contained in some writing subscribed by the party chargeable. [R. S. 1899, sec. 4294.] If an agreement not to plead the statute as a defense were regarded as an acknowledgment of a debt or a promise to pay, the agreement would fall within the very words of the section just cited and would be invalid unless in writing. But by treating it as an independent undertaking, the subject-matter of which is the statutory defense and not the debt, it may be held valid though verbal. Now, in the present case, there was no agreement to waive the defense of the Statute of Limitations if the respondent would refrain from suing a stipulated time, but simply a promise by the appellant to pay whatever balance then remained due. This promise seems to come within the words of the statute requiring an acknowledgment or promise to be in writing in order to suspend the operation of the Statute of Limitations. There is no way to render Herrington's promise to pay available to the respondent against the defense that the obligation was barred, except by annulling the express requirement of the law that a promise must be in writing to have that effect. Respondent's counsel realize this difficulty and seek to evade it on

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the theory that the promise to pay, though not valid as a contract, operates by way of estoppel, and precludes the appellant from setting up the bar of the statute. It is said his promise was relied on and no suit begun until the statutory period had expired and, therefore, it would be inequitable to allow him to use the statute as a defense, he having induced the respondent to put himself in a worse position. We have found one case which countenances this argument. [Armstrong v. Levan, 109 Pa. St. 167.] Perhaps others of a similar tenor can be found. Our opinion is that in this State the determination of the question is controlled by the statute requiring acknowledgments and promises to be in writing in order to check the running of the limitation period. To allow an estoppel based on a promise to pay after a certain contingency, which does not happen until the limitation period has expired, would be an evasion of the law. It would take cases out of the statute on verbal promises when the law says this can only be done by a written promise. Proof is lacking that the appellant induced delay in suing in order to have his debt barred. The repondent knew the statute was running as well as the appellant, and if he desired to protect himself against it, should have required the appellant to waive it. Neither thought of the matter and, therefore, the essential elements of an estoppel are lacking. The appellant was not seeking to secure a discharge of his debt by time, and if that was the result of what was said and done, it was an unthought of consequence, due to the carelessness of the respondent rather than to any fraudulent representation of the appellant. The respondent was in no sense misled in regard to the defense of the Statute of Limitations by anything said to him, and as he is supposed to know the law, and could have guarded against the effect of it by insisting on an express waiver, or suing sooner, he is in no position to assert an estoppel. [Hydraulic Brick Co. v. Neumeister, 15 Mo. App. 592; Justice v. Lancaster, 20

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Mo. App. 559; Andrae v. Redfield, 98 U. S. 255.] It has been decided in cases dealing with the very question that is now under consideration, that in order to prevent the defense of the Statute of Limitations by estoppel or waiver, there must have been a distinct agreement by the party sued not to interpose the defense. Mere reliance on the debtor's promise to pay if not sued, affords no ground for cutting him off from the defense when sued. [Hill v. Hilliard, 103 N. C. 34; Joyner v. Massey, 97 Mo. 148; Bank v. Hill, 10 Humph. (Tenn.) 176; 51 Am. Dec. 698; Andrae v. Redfield, supra.] In Bank v. Hill, 10 Humphrey, supra, the action at law was on a bill of exchange and the Statute of Limitations was interposed in defense. Thereupon the bank sought to enjoin the defendant from relying on that defense. Hill was the last indorser on the bill and desiring not to be sued, asked the bank to proceed against his previous indorser, Perkins, who was supposed to be good. Hill pointed out a tract of land owned by Perkins and urged the bank to collect the bill of exchange out of the land. At his request the bank attached the land and while that litigation was pending the Statute of Limitations ran against Hill. The debt was not made out of the land, so the bank subsequently sued Hill. That case greatly resembles this one in its facts. In neither was there a positive agreement not to plead the statute if suit was delayed. But it was asserted that Hill's conduct was equivalent to an agreement not to plead it. The court considered it an instance of an indulgent creditor relying on promises of his debtor and that such conduct could not be allowed to toll the Statute of Limitations without disregarding the law. In Andrae v. Redfield, supra, the plaintiff had sued the defendant for illegal duties exacted by the latter as collector of customs. The defense was the Statute of Limitations. To this defense it was replied that the plaintiff

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had been told by an officer of the custom house and by the Secretary of the Treasury, that if plaintiff's claim for excessive duties was presented to the auditor the presentation would, according to the rules and practice of the treasury department, prevent the Statute of Limitations from running and the statute could not be interposed as a defense to a suit brought thereafter. In that statement the defendant concurred, though disclaiming any control of the matter. The question for decision by the United States Supreme Court was whether this representation or statement to the plaintiff sufficed to prevent the statute from running against his demand. It was held there was neither a promise by the plaintiff to forbear instituting suit, nor by the defendant that if forbearance was granted the statute would cease to run; that the plaintiff might have sued at once, and no estoppel could be raised against the defendant on the statements made to the plaintiff. Though dicta may be found which support the theory of an estoppel where a creditor refrains from suing for a definite time, relying on the promise of his debtor to pay, we have found no case where that proposition is accepted as the rule of decision, unless it be the one in the Pennsylvania reports cited above. This subject is discussed but meagrely by text-writers, nor are the adjudications bearing on it numerous; but the weight of authority is in favor of the doctrine that the statute may be pleaded in defense of a claim unless it was waived by a distinct agreement not to interpose it. However, we need not generalize or go that far. What we have to deal with is a verbal promise on the part of the defendant to pay whatever was owing on the note when the Stelbrink estate was settled. It happened that more than ten years elapsed from the date of appellant's indorsement until the final settlement of the estate. Consequently the statute is a defense unless the appellant has precluded himself from interposing it. He never

agreed nor intimated that he would not interpose it. The most that can be made of the facts is that he was indulged in the expectation that he would pay according to his agreement, if the note was not collected from the estate. This expectation was based on his verbal promise; and as our statute says such a promise shall not hinder the operation of the Statute of Limitations, we hold the appellant was free to invoke the statute.

The judgment is reversed. All concur.

STATE OF MISSOURI, Respondent, v. POPE, Appellant.

St. Louis Court of Appeals, February 21, 1905.

1. **COURTS: Judicial Notice.** The court of appeals will take judicial notice of what counties are in a judicial circuit, the time of holding court in such counties and the number of judges in the circuit.

2. ———: **Circuit Court: Each County a Separate Court.** Under sections 22, 23, 24 and 29 of the Constitution of Missouri, the circuit court is not one court for an entire circuit composed of several counties, but is a separate and distinct court for each county in which a circuit judge sits.

3. ———: ———: **Two Courts in the Same Circuit at the Same Time.** Under sections 2597 and 2598 of the Revised Statutes of 1899, an adjourned term of a circuit court may be held in one county of a circuit by a judge called in from another circuit, although the regular judge may be holding a regular term of court in another county at the same time.

Appeal from Ripley Circuit Court.—*Hon. Samuel Davis*, Judge.

AFFIRMED.

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John H. Raney and *Alfred Perkins* for appellant.

Thomas F. Lane and *J. C. Sheppard* for respondent.

STATEMENT.

The defendant, Add Pope, was jointly indicted with one J. D. Thurman at the April term, 1904, of the circuit court of Ripley county for selling intoxicating liquors in less quanity than three gallons without taking out license as a dramshop keeper. Afterwards on the 30th day of May, 1904, said court being in session, the Honorable James L. Fort, the regular judge of said court presiding, the defendants filed an application in due form for a change of venue in said cause, alleging that they could not have a fair and impartial trial before said judge. On the same day the court took up and considered said application for a change of venue and granted the same. Also on the same day the court made the following order: "James L. Fort, judge of the circuit court of Ripley county, being unable to hold the remainder of the April, 1904, term of this court and there being several cases now pending in said court in which changes of venue have been granted, it is therefore ordered by the court that Honorable Samuel Davis, judge of the fifteenth judicial district of the State of Missouri be and he is hereby requested to hold the remainder of said term and preside in the trial of said cases and the clerk of this court is hereby directed to forward said cases on the judge's docket of this court beginning on page 69 thereof, and enter the same for trial on Tuesday, June 7, 1904, and following days, so that no more than ten of said cases will be set for trial on any one day." The record shows that in obedience to the above order the Honorable Samuel Davis, judge of the fifteenth judicial circuit, opened the said April adjourned term of the

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Ripley County Circuit Court on Tuesday, June 7, 1904. Afterwards, to-wit, June 8, 1904, the defendants filed the following plea, challenging the jurisdiction of the court to further proceed in said cause:

"Now come the defendants in the above-entitled cause and file this their plea to the jurisdiction of this court and say that this court ought not to have or take jurisdiction of said above cause, to try the same or make any other disposition thereof, and say that this court cannot legally take jurisdiction of said above cause for any purpose because they say and show this court that in this the 22nd judicial district of the State of Missouri, there is now being held in the city of Poplar Bluff, in the county of Butler, in said district, the regular June term of the Butler County Circuit Court; that the same is being presided over and held by the Hon. James L. Fort, the regularly elected and duly qualified judge of said circuit court, in said judicial district; that under the law there is one and only one circuit court for said judicial district, and that said circuit court cannot be in session at two different places in said district at one and the same time."

The plea to the jurisdiction was taken up, considered and overruled by the court and the defendants then and there excepted to the ruling of the court thereon. On the following day (June 9) the defendants waived a formal arraignment, entered their pleas of not guilty and the case was tried to a jury.

Upon the trial the State introduced evidence which tended to and did support the allegations of the indictment as far as the defendant, Add Pope, was concerned; but failed to sustain the issues against defendant Thurman. The court peremptorily directed a verdict in behalf of defendant Thurman and he was, therefore, acquitted by the jury. The court properly instructed the jury as to the law of the case pertaining to the guilt or innocence of the defendant Pope and they returned a verdict finding Pope guilty as charged,

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fixing his punishment at a fine of $40. On this verdict judgment was entered and thereupon said defendant filed a motion for a new trial and in arrest of judgment. These motions were overruled, exceptions saved and the case comes here by appeal for review.

Appellant, though represented by able counsel, does not complain here of errors committed on the trial other than the ruling of the court on his plea to the jurisdiction. This being a criminal case, however, we have taken pains to go through the record with care to ascertain if there was error; but none has been found.

In their brief and oral argument counsel press one question only on this court; that is, that the trial court erred in overruling the plea to the jurisdiction. In the court below to sustain the allegations of said plea the defendant introduced in evidence orders of the Butler County Circuit Court (which county adjoins Ripley county and is in the same circuit) for the purpose of showing that Judge Fort, the regular judge for that circuit, was then holding the regular June term of the circuit court of Butler county in said circuit. This court will take judicial notice of the fact that both Butler county and Ripley county are in one and the same judicial circuit (the twenty-second) and that the regular June term of the circuit court of Butler county convened, as provided by law on Monday, June 6, 1904, and that there was but one regular judge for said circuit. It is shown that the regular June term of the Butler County Circuit Court was in session, the regular judge presiding at the time; that the April adjourned term of the Ripley Circuit Court was convened with Judge Samuel Davis presiding.

NORTONI, J. (after stating the facts).—Appellant contends that "two circuit courts for the same circuit cannot be convened and holden the same day." A court is a judicial assembly. Bouvier gives the

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word "court" this definition: "A body in the government to which the public administration of justice is delegated. The presence of a sufficient number of the members of such body, regularly convened in an authorized place at an appointed time engaged in the full and regular performance of its functions." The Supreme Court of California has said: "A court is a tribunal presided over by one or more judges for the exercise of such judicial power as has been conferred upon it by law." The Supreme Court of Missouri in State ex rel. v. Woodson, 161 Mo. 444, has adopted the above definitions. Section 1, article 4, Missouri Constitution provides that the judicial power of the State as to matters of law and equity is vested in the Supreme Court, circuit courts, etc. Section 22, of the same article, provides that the circuit court shall have jurisdiction, etc. . . . It shall hold its terms at such time and place in *each county* as may be by law directed, but at least two terms shall be held every year in *each county.* Section 23 provides that the circuit court shall exercise superintending control over . . . *in each county in* their respective circuits. Section 24 provides that the Legislature may divide the State into convenient judicial circuits. Section 29 provides as follows:

"If there be a vacancy in the office of judge of any circuit, or if the judge be sick, absent, or from any cause unable to hold any term or part of term of court *in any county* in his circuit, such term or part of term of court may be held by a judge of any other circuit; and at the request of the judge of any circuit, any term or part of term in his circuit may be held by the judge of any other circuit and in all such cases, or any case where the judge cannot preside, the General Assembly shall make such additional provision for holding court as may be found necessary."

It appears from the above sections of the Constitution that the circuit courts, while they are courts of

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general jurisdiction, are courts not for an entire circuit, but for *each county* in which a circuit court sits. The judge, however, is for the circuit. So how the sitting of the circuit court in Ripley county, if regularly in session, authorized by law, would interfere with the circuit court sitting in Butler county, or the sitting of the circuit court in Butler county would interfere with the proceedings in the circuit court of Ripley county, is more than we can comprehend. "The circuit court of each county is a seperate, distinct entity, an existence in itself." [First Nat'l Bank v. Parsons, 45 W. Va. 688.] Our Constitution, the statutes, and in fact, all our law points to the inevitable conclusion that the circuit court is a court for the county and not for the circuit. The circuit court in Butler county was in session in its regular term. The question is, was the circuit court in Ripley county, in which the defendant was tried, in session under authority of the law? If so, it had jurisdiction of defendant and his cause and there was no error in overruling his plea to the jurisdiction. Section 2594, Revised Statutes 1899, provides "when an indictment in a criminal prosecution shall be pending in a circuit or a criminal court, the judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases . . . or, when the defendant shall make and file an affidavit supported by the affidavits of at least two reputable persons, not of kin or of counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial." Section 2595 provides that "whenever in a criminal cause the defendant shall make application under oath and supported by affidavits of two or more reputable persons, not of kin or counsel for the defendant, as to the truth of the allegations in such application for such change of venue for any of the reasons stated in the next preceding section, it shall be lawful for the judge to hear

and determine such application," . . . and then provides for the election of a special judge by agreement in writing between the parties with the concurrence and approval of the court. Section 2596 provides for the oath of this special judge. Section 2597 is the more important however, and provides for the calling in of the judge of some other judicial circuit of the State to hear the case in certain contingencies. We quote that section in full as follows:

"If in any case, the jüdge shall be incompetent to sit for any of the causes mentioned in section 2594, and no person to try the case will serve when elected as such special judge, the judge of the court shall, in either case, set the cause down for trial on some day of the term, *or on some day as early as practicable in vacation,* and notify and request the judge of some other circuit to try the cause; and it shall be the duty of the judge so requested to appear and hold the court at the time appointed for the trial of said cause; and *he shall, during the trial of said cause, possess all the powers and perform all the duties of a circuit judge at a regular term of such court,* and may adjourn the case from day to day, or to some other time as the *exigencies of the case may require,* and may grant a change of venue in said cause to the circuit court of another county in the same circuit, or to another circuit; and whenever said cause shall be removed to the circuit court of another county in the same circuit, it shall be the duty of the judge so requested to appear and hold the court at the time set for the trial of said cause in the circuit court of the county to which said cause shall be removed: Provided, that if the person elected as such special judge shall refuse to serve, or if the judge so requested shall fail to appear and hold the court at the time appointed for the trial of said cause, the judge of said court shall *reset said cause for trial, to suit the convenience of the judge so requested* to try said cause, or may notify and request the judge

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of some other circuit to appear and try said cause, as heretofore provided. Should said judge so requested fail to appear and hold the court at the time appointed for the trial of said cause, the judge of the court shall order a change of venue in said cause to some other circuit. Said order may be made in term time, or by the judge of the court in vacation, by an order in writing, which the judge shall file with the clerk of the court in which said cause is pending. Whenever the judge so requested shall appear and hold the court for the trial of said cause, he shall, in addition to the salary now allowed by law, receive his actual expenses and five dollars per diem for the time necessarily engaged in the trial of said cause and in going to and returning from the place of trial, which shall be paid out of the State treasury upon the certificate of the clerk of the court in which such cause is pending. Whenever the special judge elected to try a cause shall appear and hold court for the trial thereof, he shall receive ten dollars per day for the time necessarily engaged in such trial and five dollars per day while going to and returning from the place of trial, if he reside out of the county where said cause is tried, to be paid out of the State treasury upon the certificate of the clerk of the court where said cause is tried."

Section 2598 is as follows:

"When any cause is set down for trial *in vacation, as* directed in the next preceding section, *the judge shall adjourn the term to that day, at which time an adjourned term of said court may be held for the trial of the cause, and* the court shall notify or recognize the witnesses in the cause to appear at the time set for the trial thereof, and their attendance may be compelled by attachment, as in other cases."

This last section authorizes in plain terms the adjournment of the court to any day in vacation of the Ripley, not the Butler, Circuit Court that the cause may be set down for trial and says "an adjourned term

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of said court may be held for the trial of said cause." When? We hold at any time in vacation of the Ripley Circuit Court that suits the "convenience of the judge" and the "exigencies of the case" regardless of courts in session in other counties of the same circuit.

Section 29 of the Constitution above quoted conferred upon the Legislature full and complete authority to provide for cases when the regular judge is disqualified. By the sections of the statute above quoted, the Legislature has made ample provisions and authorized the calling of Judge Davis to hold the court. [R. S. 1899, sec. 2597.] That section authorized Judge Fort, the regular judge, "to set the cause down for trial on some day of the term *or on some day as early as practicable in vacation.*" In vacation of what? Of the Ripley County Circuit Court. That is, on some day convenient to the judge being called in between the regular terms of the Ripley Circuit Court. In construing these statutes we must keep in mind what we know and what the Legislature which made this law knew, that the judicial circuits in this State are composed as a rule, of several counties—say an average of four or five counties to the circuit. In some counties by a special act, there are two or more courts. Now the judge who is to be called in to hold the court under these provisions may and often does, and in fact in this case did, reside several hundred miles away from the court he was called upon to hold; that he, too, being a judge of a circuit court, had his time occupied with the duties of his own court in several counties over which he presided; that to dispose of the court held by him in his circuit at the regular term thereof and then probably cross the State to hold court in Judge Fort's circuit might and probably would bring about a condition which would render it impossible to hold the court in Ripley county at all unless at a time when some other court in the same circuit was in session. It is provided in the section above quoted that "if the

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judge so requested, shall fail to appear and hold the court at the time appointed for the trial of said cause, the judge of said court shall reset said cause for trial *to suit the convenience of the judge so requested* to try said cause." This provision is not to suit the "convenience" of other regular terms in the same circuit, but it is to suit the "convenience of the judge so requested." It seems clear to us that the Legislature proceeded upon the theory that these courts to be held under this statute were to be held regardless of other courts in other counties in the same circuit, and to suit the convenience of the particular judge and case involved. If the contention of the appellant is correct, that under the law the circuit court of Ripley county could not be held to try defendant and his case at the time a circuit court of any other county in the same circuit was in session, then, in the event of a stress of business in the various counties of the circuit where the time of the regular judge would be continuously occupied from one regular term to another, which might occur, no court could be held to try the defendant's cause; and for this reason the entire purpose of the statute would fail. Courts will decline to lay down a rule that might thus defeat the wholesome provisions of the statute unless there is some good reason shown therefor. On the other hand, the stress of business in the circuit from which the "requested judge" comes might be such that the judge could not go out of his circuit into another to try the case at a time when no other court in that circuit was in session and for this reason the statute would fail. This court will not put such a narrow construction upon the statute as will defeat its wholesome purpose. If Judge Davis was acting within the pale of the law when he held the Ripley Circuit Court, or, in other words, if "he was exercising such judicial power as had been conferred upon him by law," when holding said court,

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then the tribunal over which he presided, and before which the defendant was tried, was the circuit court of Ripley county and it had jurisdiction—power to hear and determine the case. Section 2597, supra, under the provisions of which Judge Davis went upon the bench of the Ripley Circuit Court, provides, among other things, that "he shall, during the trial of said cause, *possess all the powers and perform all the duties of the circuit judge at a regular term of such court.*" This would of itself seem to be conclusive upon this question; here is express warrant of law, making the court he was holding the equivalent of a regular term. The section proceeds upon the theory that a term other than a regular term is being, or to be held by the special judge. This would necessarily imply that such special adjourned term being held by an outside judge between the date of the regular terms in that county might, and probably would, be held on days on which other courts might possibly be in session in other counties. It expressly says that the special judge shall possess all the powers and perform all the duties of a circuit judge at a regular term. There can be no question as to the power of the circuit judge at a regular term of this court. The special judge had the same power and jurisdiction at the time set for the trial as the regular judge would have in regular term had no change of venue been taken in the case. The court which tried the defendant's cause came clearly within the definition of a tribunal exercising judicial power authorized by law. Defendant having disqualified the regular judge and Judge Davis being called in, no one other than Judge Davis could hold the court. On this state of the record no right of the defendant possibly could be abridged by reason of the court being held at the same time as the court in Butler county. No question of public policy could intervene, nor is such question involved in this matter.

The appellant's contention is not very clear. He

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rests upon the broad proposition that two circuit courts cannot be in session at the same time in the same circuit, and cites a number of cases from Arkansas and other States, many of which say as much, without assigning reasons therefor, other than the peculiar constitutional and statutory provisions in each case. If appellant's objections are based upon the proposition that the judicial power is vested for the circuit at large as contradistinguished from the counties, and cannot be exercised in two counties of the same circuit at the same time, we would answer that the judicial power emanates from the State through the medium of the Constitution; that under the Constitution this power is conferred upon such tribunals as are authorized by law and may be employed at such times, places and in such manner as the legislative authority may provide, not conflicting with the constitutional provisions. And in this case the Legislature has made ample provision for the employment of the judicial power at the time and place of defendant's trial. Appellant cites numerous authorities to sustain his proposition. We have examined each case and authority, as well as many others, with great care and conclude that none of those cases are in point here. Many of them are based upon constitutional and statutory provisions different from our own. Others deal with questions, as when, through inadvertence, the Legislature provided for separate and distinct regular terms of the same court in different counties of a district to be held the same day by the same judge. The courts have held that this could not be done. No one can dispute this proposition. It is a physical impossibility for the same judge to hold two courts in different places at the same time. Several cases cited assert the bare proposition that two circuit courts cannot be in session at the same time in the same circuit, and content themselves with the assertion without assigning a reason therefor. Unless the proposition rests upon principle or reason,

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it certainly should not be followed, and, in fact, should be disapproved and overthrown. The most intelligent deduction from the authorities cited is that announced by the Nebraska court, where many cases are collated and cited. In Tippey v. State, 35 Neb. 368, the court says: "The general rule no doubt is that a court cannot be held at the time when there is clearly no authority to hold it, and where the terms are fixed by statute so that one term closes in a particular county at a definite time and a term in another county begins. There being but one judge in the district, court cannot be held in two counties at the same time for the reason that the authority is wanting." But the court ruled, however, under the Constitution and statutes of Nebraska, authority is not wanting that the district court may be held at the same time in different counties in the same district and a term may be continued and held during a time fixed for holding court in another county. We acknowledge this rule, but like the Nebraska court, we find authority in the Constitution and the statutes for holding an adjourned term of court at the time and place it was holden. In In re Millington, 24 Kan. 214, the Supreme Court of Kansas, speaking through Judge, now Mr. Justice, Brewer, said: "The commencement of a term is a legislative command to the elected judge to be present and discharge the judicial duties devolving upon him in that county. It operates as a suspension of his duties in all other counties in his district, and suspends, or closes, the term in those counties." The opinion further says that a special judge cannot continue the court in one county while the regular judge is holding the regular court in another county. This is certainly high and respectable authority; but we find our own Supreme Court has taken a different view, and holds that the statutes fixing the time of holding the court is only directory; and again, that it is competent for the Legislature to provide for the courts

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being held at the same time in different counties and we hold that by every reasonable implication the statutes of Missouri above quoted, have made such provision. Entertaining this view we are not going counter to the very able opinion of Mr. Justice Brewer. And, furthermore, this case cannot come within the language or the reasoning of Mr. Justice Brewer's opinion. He says the law fixing the opening day of court in one county is a command for the elected judge to be there and *ipso facto* suspend all his courts elsewhere. This cannot apply here, as the regular judge could not hold this court in Ripley county under any circumstances. Having been disqualified, he can proceed under the command of the law to open the Butler County Circuit Court. The other judge, acting under the authority of the law, could exercise the judicial authority conferred upon him by section 2597, supra, to try this case in Ripley county while the regular judge was exercising the judicial authority conferred upon him by general law and in virtue of his office hold the regular term in Butler county. The command of the law to open court in Butler county might suspend the duties and authority of the regular judge (Judge Fort) in all other counties in the circuit except for the purpose of adjourning other courts as provided by statute. Still, Judge Davis, being clothed with authority of law in this particular case, acted thereunder and did not attempt to exercise the suspended authority of Judge Fort in Ripley county. But our own Supreme Court holds a different view from that expressed by Mr. Justice Brewer; that is, that the statute is directory and not mandatory. In Samuel v. The State, 3 Mo. 68, in the Boone County Circuit Court at the June term, 1831, the defendant was tried for murder in the first degree. On Saturday evening, the last day of the term, the trial was not yet ended. On the following Monday under the law the regular term of the Howard County Circuit Court in the same circuit came on. The judge

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made an order in the Boone Circuit Court to the sheriff to adjourn the court until Monday morning and to proclaim that on Monday a special term of that court would be holden in continuation of that term to finish the trial of the prisoner, which proclamation was made. The court was holden accordingly and on Tuesday resulted in a verdict of guilty and sentence of death was pronounced. The court states the proposition decided and arguments advanced to sustain it as follows: "The third objection is that the circuit court of Boone county could not have lawfully held an adjourned term of the June regular term for that county, on the day it did hold court, because on that day the law required the same judge to hold, or begin to hold, a court in Howard county. Messrs. Gordon and King for the prisoner contended that the holding of the adjourned term on Monday interfered with the court to be holden in Howard county on the same day, and that everything done therein was void, because they say the law had directed the judge to be at Howard on that day and to hold court, and he could not be at both places at the same time; and his first duty was to hold court in Howard. This argument further is, that when the law says court shall be holden on a certain day in Howard county, it forbids the judge from holding court elsewhere on that day. . . . The court could not with propriety, nor with justice to the prisoner, witnesses and jurors, have postponed the court until the business of his whole circuit could be got through with; and as the Attorney-General has aptly argued, no time could have been fixed upon that might not have interfered with some of the courts in some of the counties. If the special court had been put beyond the week of the last court in the circuit, yet the court could not know in advance positively that the business of that court would not require all the time intervening till the commencement of the regular circuit again. The court in this case did nothing more than that which

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it might lawfully do. But it is argued that there could be no judicial time in Boone, after the first week had expired, because the Legislature had positively said that on next Monday judicial time should begin in Howard county. . . . We cannot see how the failure, the total failure to hold court in Howard county, could possibly prejudice this man. The court there had nothing to do with his rights, nor with his case. This argument is, that on Saturday night the jury should have been discharged, and that he should have been sent to prison till another term. . . . It is deemed a sufficient answer to say, that by the law and the Constitution, the court had jurisdiction of the case, and having gone lawfully into the trial, it was the positive duty of the court to finish it in some way, and at some time, unless prevented by overbearing obstacles, though the legislative command to hold court in Howard, should be entirely unattended to. Any other construction of the will of the Legislature would be to suppose them ignorant of human affairs, and to act and direct without reason or adequate motive. The counsel have cited a case from Peak's reports as being in point. We consider that case unlike the present case, in this, that the act of the Legislature of Tennessee contains no provision for holding special adjourned terms of court.'' The Supreme Court in the Samuels case expressly disapproved the decision cited from Tennessee, even though there is no statute in Tennessee authorizing the holding of a special or adjourned terms of court and said: ''We do not like that decision, and if our statute were exactly like that of Tennessee, we believe we would object to the reasons and ground on which the case is made to rest.''

In Lewin v. Dille, 17 Mo. 64, the Madison County Circuit Court, during a trial, the term being about to expire, ordered a special term the next day, the same day fixed by law for holding the regular term in Bollinger county. The Supreme Court held that ''there

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was no error in this ruling of the court upon the matter of adjourning over to a day on which court was to begin in a different county. This point was decided in the case of Samuels v. The State, 3 Mo. 68, and we consider this part of the statute *merely directory.*" In the Lewin case there was a statute (R. S. 1845, chap. 45, sec. 54) which said "that no special term shall interfere with any other court to be held by the same judge." Notwithstanding this statute against special terms interfering with regular terms, the Supreme Court sustained the action of the lower court and held the statute merely directory. We find high and respectable authority holding that the proceedings of an adjourned term are not void because the court was held at a time when the regular term of another county was in session. [Smurr v. State, 105 Ind. 125; L. & M. A., etc., Railroad v. Power, 119 Ind. 269; Wadham v. Hotchkins, 80 Ill. 437; Cahill v. People, 106 Ill. 621.]

In the case of State v. Knight, 19 Iowa 94, it was held that a judge might continue a term of court into the time fixed by law for holding a court in the same district and the earlier cases of Davis v. Fish, 1 Green (Ia.) 408, and Grable v. State, 2 Green (Ia.) 559, were in effect overruled. This last case cited was relied upon by appellant—also cited and relied upon and in fact, it was the only case cited and relied upon by Mr. Justice BREWER on this point, in In re Millington, supra. So we see that Mr. Justice BREWER's opinion is based upon the doctrine of this case borrowed from Iowa, which also has been, in effect, overruled by the court of that State. The same court held in Weaver v. Coolidge, 15 Iowa 244, that a judgment rendered three days after the time fixed for the commencement of another court in the same district was not void. To the same effect are State v. Clark, 30 Ia. 168, and Cook v. Smith, 54 Ia. 636. It was held that a judgment pronounced at a term continued over the time fixed by law for another term in the same district was not erro-

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neous. [State v. Stevens, 25 N. W. 777; State v. Peterson, 25 N. W. 780.] The Supreme Court of Wisconsin denied the doctrine of the two earlier Iowa cases, supra, and decided that holding a court during a time designated by law for holding another court in the same judicial district did not invalidate the proceedings. [State v. Leahy, 1 Wis. 225.] These cases hold a different doctrine from that announced by Mr. Justice Brewer, supra, and favor that long since announced by the Supreme Court of Missouri.

The Supreme Court of West Virginia, like that of Missouri, has taken a broad and liberal, yet conservative view of this question in an ably considered opinion so strongly in point here that we quote extensively from it. That court said: "Look at the inconvenience and evil resulting from a different construction. An important criminal cause, occupying days or weeks in one county, is heard. The jury is out deliberating, but has not yet reached a verdict. The clock strikes the hour when the judge ought to leave to get to his next court. He calls in the jury, and disbands it; remands the prisoner to jail. All the expense and work go for naught, and worse yet, the prisoner is deprived of his right of a speedy trial. I cannot yield to this construction entailing so much evil, without a statute more plainly calling for it than our present statute. Therefore, I think the acts of the circuit court of Tucker not void, though done by that court sitting any number of days into the term fixed for the circuit court of Preston. It seems to me that common sense, convenience, dispatch of the public business, range themselves on the side of one construction; mere idle technicality and inconvenience on the other. Two courts in the same circuit can proceed at the same time in different counties. The law provides that a judge of one circuit may hold in that of another. The circuit court of each county is a separate, distinct entity—an existence in itself. Why a lawful judge may not sit in one county,

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another lawful judge in another county of the same circuit at the same time, I have yet seen no good reason. It does not appear whether the circuit court of Preston was going on at the time or not. If so, it would not, in my judgment, alter the case.'' [First Nat'l Bank v. Parsons, 45 W. Va. 688.]

Our conclusion is that the court in which the defendant was tried was a tribunal exercising judicial power at the time and place of the trial under the warrant, provisions and authority of the law. The judgment is, therefore, affirmed. All concur.

WILLIAMS et al., Appellants, v. HARRIS, Respondent.

St. Louis Court of Appeals, February 21, 1905.

1. **APPELLATE PRACTICE: Bill of Exceptions: Record Proper Must Show Filing.** The abstract of the record authorized by section 813 of the Revised Statutes of 1899, to be filed by the appellant in the court of appeals, must show by the record proper the filing of the bill of exceptions and an extension of time for filing the same if filed after the term.

2. ———: ———: **Recitals.** The recital of such orders in the bill of exceptions will not supply the omission of them from the abstract of the entries upon the record proper.

3. ———: **Abstract of Record.** The abstract of the "entire record," authorized by the said section 813, in lieu of a full transcript, must include the orders upon the record proper as well as the matters contained in the bill of exceptions.

Appeal from Lawrence Circuit Court.—*Hon. H. C. Pepper*, Judge.

APPEAL DISMISSED.

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John A. Williams, pro se, and *H. H. Bloss* for appellants.

It was not necessary that the abstract set out the orders extending the time, it was sufficient to merely state their substance as this one does. Ricketts v. Hart, 150 Mo. 64, 51 S. W. 825. Or to use the language of the decision, "A narrative of the several steps is held sufficient as the statute contains within itself the means of protecting this court against imposition." McDonald v. Hover, 142 Mo. 484, 44 S. W. 334; Kincade v. Griffith, 64 Mo. 676; Stewart v. Sparkman, 69 Mo. App. 456; State v. Craft, 164 Mo. 631, 65 S. W. 280; State v. Brown, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200.

Henry Brumback for respondents.

(1) Appellants' abstract of the record presents nothing to this court for review. Nothing at all has been printed, except the bill of exceptions. No order of court is shown touching the filing of a bill of exceptions and no order of court extending the time for such filing, and these, alone, are fatal. St. Charles ex rel. v. Deemar, 174 Mo. 122, 74 S. W. 369. (2) The abstract does not contain the affidavit for appeal or order granting appeal, or any order extending time for filing a bill of exceptions, nor any part of the record, save the unauthenticated bill of exceptions. Hence there is not even a record here for review. The bill of exceptions is not the proper receptacle for any of these, and recitals therein cannot supply the production of such of them as appear therein. Walser v. Wear, 128 Mo. 652, 31 S. W. 37; Greenwood v. Parlin & Orendorff Co., 98 Mo. App. 407, 72 S. W. 138; Parry v. Coffee & Spice Co., 98 Mo. App. 410, 72 S. W. 130; McCormick Co. v. Crawford, 98 Mo. App. 323, 72 S. W. 491; Hughes v. Henderson, 97 Mo. App. 312; Byrdick v. Life Assn., 86 Mo. App. 94; Shoe Co. v. Williams, 91 Mo. App. 511.

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NORTONI, J.—This case is brought here by the short form, transcript of the judgment and order granting the appeal. That which purports to be the abstract of the record is as follows:

"ABSTRACT OF RECORD.

"Appellant submits the following abstract as setting forth so much of the record as is necessary to a complete and full understanding of all questions presented to this court for decision." And thus the abstract ends. Then follows the title:

"BILL OF EXCEPTIONS."

This bill of exceptions contains the petition, remonstrance and several motions in a public road case, together with evidence of witnesses, the finding and judgment of the court thereon, motion for a rehearing and a statement that said motion was overruled and exceptions saved. The bill of exceptions also contains a recital that time was given appellants for the filing of the bill; also two other recitals that at different times named the time for filing the bill was extended and it concludes as follows: "And now on this tenth day of December, 1904, within the time allowed by the court for filing their bill of exceptions in said cause, the plaintiffs present their bill of exceptions in this cause and pray that the same may be signed, sealed and made a part of the record in said cause, which is accordingly done. Henry C. Pepper, circuit judge of Lawrence county." Outside of this bill of exceptions not a single record entry appears showing the bill was ever filed.

In such case there is nothing for this court to review except the record proper. [St. Charles ex rel. v. Deemar, 174 Mo. 122, 73 S. W. 469.]

There is no record proper here other than the judgment and order granting an appeal and they are in the usual and approved form.

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There is no transcript of the record of an order of court before us granting time in which to file bill of exceptions nor of any order granting an extension of that time, hence no authority appears for ordering the filing of the bill December 10, 1904, as appears from the judge's certificate, supra. There must be some authority *aliunde* the bill authorizing its filing; the record must show that. The bill cannot be permitted to prove itself. There is indorsed on the bottom of the bill of exceptions, to-wit: "Filed December 14, 1904. M. B. Gardner, Circuit Clerk, as indicated above said bill of exceptions was duly signed by the judge of said court on December 10, 1904, and duly filed in the office of the clerk of said court on December 14, 1904, and thus became a part of the record in said cause." This quotation does not purport to be any part of the record. That portion of it, however, commencing with the word "filed," and concluding with the word "clerk" (inclusive of both words) no doubt is the indorsement of the clerk on the bill showing the filing of the same in his office. The remainder of the statement, however, is only a recital of a fact which does not appear by any record before us nor in the bill. Our Supreme Court, however, has settled this question in the following language: "Even if it appeared that the bill had been filed, its recitals could not supply the other necessary record entries." [St. Charles v. Deemar, supra; Butler County v. Graddy, 152 Mo. 441.] A recital in a bill of exceptions of matters which are a part of the record proper will not supply the omission of those matters from the transcript of such record. [Western Storage Co. v. Glasner, 150 Mo. 426, 52 S. W. 237; Walser v. Wear, 128 Mo. 652, 31 S. W. 37; State v. Harris, 121 Mo. 445, 26 S. W. 558.]

Ricketts v. Hart, 150 Mo. 64, 51 S. W. 825, cited by appellant cannot help him in this case. The court there says (l. c. 68): "It has been uniformly ruled by this court that the record proper must, if in term time,

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show the filing of the bill of exceptions, and, if the time *be extended in term time, the record proper must show it* and the minute of the clerk in vacation must show the filing within the time allowed." (The italics are our own.)

That portion of section 813, Revised Statutes 1899, under which this appeal is attempted, authorizing appeals by filing in this court, "in lieu of a full transcript, a certified copy of the judgment . . . appealed from . . . together with the order granting the appeal," requires appellant to "file printed abstracts *of the entire record* of said cause in the office of the clerk of such appellate court." There is no printed abstract of any part of the record filed here, much less of the "entire record."

For the reasons stated, the appeal must be dismissed. It is so ordered. All concur.

STATE OF MISSOURI, Respondent, v. MILLER, Appellant.

St. Louis Court of Appeals, February 21, 1905.

1. **ROADS AND HIGHWAYS: Jurisdiction of County Court: Petition.** Where a county court acted upon a petition to change the route of a road, it will be presumed in a collateral proceeding that the court found, on competent evidence adduced before it, that the petition was properly signed, although the order did not recite the finding.

2. **———: ———: Petition and Notice.** The presentation of a petition to the county court for a change of road, accompanied by proof of the legal publication of notice to parties interested, gives the county court jurisdiction to order the change, and its finding and judgment will not be open to collateral attack.

3. **———: ———: ———: When Court May Act.** And such a petition may be acted upon at the term at which it is presented, if lawful and timely notice has been given.

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4. ——: ——: **Errors.** The granting of a petition and ordering a change of road, without hearing evidence as to the necessity, probable damages, costs, etc., have nothing to do with the jurisdiction, but are merely erroneous procedure and can not be inquired into in a collateral proceeding.

5. ——: ——: **Process.** Where the county court, acting upon the requisite notice and petition which gave it jurisdiction, ordered a road changed, one who closed up the old road in obedience to a direct order of the county court was acting lawfully.

6. ——: ——: ——. The rule that an officer executing process is only bound to see that it is "fair on its face" and need make no inquiry further than to ascertain if the court has jurisdiction over the subject-matter, applies to one closing up a highway in pursuance of an order of the county court.

Appeal from Texas Circuit Court.—*Hon. Leigh B. Woodside,* Judge.

REVERSED.

T. J. Hale and *Lamar, Barton & Lamar* for appellant.

(1) The court should have directed an acquittal, because the county court record is sufficient to change the road. All jurisdictional facts sufficiently appear somewhere in the proceeding. Sutton v. Cole, 155 Mo. 206, 55 S. W. 1052. (2) The findings and judgment of the county court are not open to collateral attack and its judgment is entitled to every presumption in its favor. Baubie v. Ossman, 142 Mo. 499, 44 S. W. 338. (3) When we consider the pleadings and entire record, all obscurity is dispelled and the intention of the court made apparent. This we are entitled to regard and have the record as thus explained given effect. Clay v. Hilderbrand, 34 Kan. 694; 1 Black on Judgments, sec. 123. This is certainly true in a criminal prosecution. (4) The uncontradicted evidence tended to show that defendant acted in entire good faith under the direction of the county court. Defend-

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ant's first refused declaration of law submitted this as a defense. This was error. State v. White, 96 Mo. App. 34, 69 S. W. 684; State v. Ferguson, 82 Mo. App. 583; State v. Preston, 34 Wis. 682.

STATEMENT.

The defendant Miller was informed against and convicted of the offense of unlawfully obstructing a public highway in Texas county, Missouri, leading from Cabool to Mt. Grove, and known as the Cabool and Mt. Grove road. The alleged obstruction was placed in said road where it crossed defendant's farm and consists of a fence built across the road in the year 1899. The information was filed by the prosecuting attorney November 11, 1903, and averred that the fence, though originally erected across the road in 1899, had remained there as an unlawful obstruction ever since. In 1897 a petition was presented to the county court of Texas county signed by many persons and reciting that more than twelve of them were freeholders, asking that the road in question be diverted from part of its course and a new route opened for a designated distance. In other words, the petition was for a change of the road, describing the old route and the one the petitioners wished to open in lieu of it. Due notice was given by posting handbills of the intended application for the change of the road, and on proof of this fact, the county court entered an order to grant the change petitioned for at the expense of the petitioners, ordered the road commissioner to survey and mark out the course of the road, take relinquishments of right of way and report what he had done at the August term, 1897, of said court. His report was filed in due time and on November 3, 1897, the court approved it. The report is quite full as to the course the road should run after the contemplated change, the names of persons who had relinquished right of way, the description of their property, the

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land given for right of way, and the names of two landowners through whose lands the road would run who refused to relinquish right of way. It contains no estimate of the costs of the construction of the new road in making culverts, bridges and grading, nor a statement of the amount of damages claimed by the property-owners who had refused to relinquish right of way. Subsequently in March, 1899, a petition signed by numerous citizens was presented to the county court asking the court to reopen the road upon the course it had run previous to the change. This petition was rejected. The following admission appears in the transcript:

"It is admitted in open court by the prosecuting attorney and the defendant, that the defendant got a written order from the clerk of the county court which was given by the direction of a majority of the judges of the county court, to close up the road in question."

It was shown the court was in session when the order to close the old route was given to the defendant. He acted under the order and then turned it over to the railway company whose line the new road crossed, for the company to go by in putting in a crossing. Part of the old road which was abandoned in favor of the new one, ran across the defendant's farm and he built a fence across it. It appears that the defendant was opposed at first to the change of route; but after it had been ordered by the county court and a written order had been issued to him to open the new route and close the old one, he obeyed the order.

Of its own motion the court instructed the jury as follows:

"1. The court declares the law to be that where it is shown that a road has been used by the public and worked by the road overseer for a period of ten years, that it is sufficient evidence to find that it was a public road within the meaning of the road laws of

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this State, and to which the public have a vested right.

"2. The right of the public to an established road could not be divested except in the way directed by the statute, and the county court has no jurisdiction to make an order, establishing a new road or changing an old one, until it has been examined and located by the road overseer and either the report of said road overseer must show that the money has been paid with which to construct the same or that it has been constructed by the petitioners.

"3. Where a petition for a change of road sets out specifically the ground upon which it is to run, its courses and distances, neither the commissioner nor the county court can afterwards change said route and grant a change of road upon a different line from that set out in the petition, and any order attempting so to do is absolutely void.

"4. The court further declares that if the defendant John P. Miller, in the month of August, A. D. 1899, did unlawfully obstruct a public road in Texas county, Missouri, to-wit: a road leading from Cabool to Mountain Grove, Missouri, and known as the Cabool and Mountain Grove road, by building a fence across the same, and if he has maintained said fence across said road, within one year before the filing of the information in this case, then he should be found guilty of obstructing a public road."

All the instructions asked by the defendant were refused. They need not be copied.

GOODE, J. (after stating the facts).—It is conceded by the State that the defendant acted pursuant to the written order or process of the county court in closing the old road, but is contended that the order affords him no protection, because said court was without jurisdiction of the matter. The warrant or process to the defendant is not before us; but the State has made no point against its form or regularity and we

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shall assume, in disposing of the appeal, that the order was fair on its face, contained nothing to show the county court acted without jurisdiction of the cause and directed the defendant to close a stretch of the old road which included the point where he built his fence. This is taken for granted in the briefs of both parties and may be considered as covered by the admission made in open court. The essential controversy turns altogether on whether the county court had the jurisdiction requisite to enable it to issue a writ that would protect the defendant in closing the old road. The jurisdiction of the county court is assailed on several grounds. It is said the court granted the petition for the change of road and ordered the road commissioner to mark out the new route without previously finding that the petition was signed by twelve freeholders, without finding that notice of the intended application had been given as required by the statute, at the term of court when the petition was presented, before the court had heard testimony as to the necessity or practicability of the change, the probable damages to non-consenting landowners and the expense of locating the changed road, and before the road commissioner had been ordered to view and mark out the the road or had made a report of the cost of construction and the other matters he is required to report. By reason of the foregoing facts it is contended the county court acted without jurisdiction. The description of the proposed new route contained in the entry of record of the order granting the prayer of the petitioners and directing the road opened, is asserted to vary from the description of the proposed route in the petition itself, and the route designated by the county road commissioner to differ from both prior descriptions.

The entry of the order granting a change of road and directing the road commissioner to mark out a new route, has no recital that the petition was signed

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by twelve freeholders; but we think it should not be held, in this collateral proceeding, that the county court was without jurisdiction on account of the absence of this recital. That very point was decided in Snoddy v. Pettis County, 45 Mo. 361, in which case the court said:

"It is claimed that those proceedings were erroneous; First, because the petition does not show that twelve of its signers were householders of the township, etc. The statute is express that it must be signed by that number of householders, etc., three of whom shall be of the immediate neighborhood of the road. But it does not say that they shall be so described in the petition; and if they were so described, it would have been no evidence of the fact. This character of the petitioners must be proved to the satisfaction of the court before any action is taken upon their petition; and it would be well, though it is not essential, for the record to show the finding of the court in this regard. But if the county court makes an order in relation to the subject-matter of the petition, which it would have no right to make without preliminary proof, we are bound to suppose, unless the contrary appears, that this proof was made."

This ruling has been followed many times and was reviewed and declared sound in Belk v. Hamilton, 130 Mo. 292, 300, 32 S. W. 656, where the decisions in support of it are assembled. There is some contrariety of opinion in various jurisdictions on this proposition; but the cases cited appear to settle the proposition in Missouri against the contention of the State. As the county court acted on the petition, it is to be presumed, *in a collateral inquiry,* that the court found on competent evidence adduced before it, that the petition was properly signed.

The record of the county court shows it found the requisite notice had been given of the intention to present the petition. County courts have exclusive juris-

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diction of proceedings to open and change roads and, hence, the county court of Texas county had jurisdiction of the subject-matter of this particular proceeding. [Lingo v. Burford, 112 Mo. 149, 20 S. W. 459.] The presentation of the petition for a change of road, accompanied by proof of legal publication of notice to parties interested, gave the county court jurisdiction of this proceeding, and its finding and judgment are not open to collateral attack. [Baubie v. Ossman, 142 Mo. 499, 44 S. W. 338; Daugherty v. Brown, 91 Mo. 26, 30, 3 S. W. 210; Zimmerman v. Snowden, 88 Mo. 218.]

The statute allows a petition for the opening of a new road or for a change of road, to be acted on during the term of court at which it is presented, if lawful and timely notice has been given. [R. S. 1899, secs. 9415, 9416; R. S. 1899, sec. 7798.]

That the court granted the petition and ordered the road commissioner to mark out the road without hearing evidence of its cost and other matters, plainly had nothing to do with its jurisdiction, but was merely an erroneous procedure. As much may be said of the circumstance that it acted on an incomplete report from the commissioner and one containing no estimate of the cost of construction or the damages asked by non-relinquishing property-owners. The court's jurisdiction of the proceeding depended on the presentation of a proper petition after seasonable posting of proper notices. [Cases supra.] That a failure on the part of the county court to observe the law in such particulars as those just mentioned, does not lay an overseer liable for carrying out an order of the court was determined in Butler v. Parrish, 18 Mo. 357; Walker v. Likens, 24 Mo. 298; Patten v. Weightman, 51 Mo. 432; Crenshaw v. Sayder, 117 Mo. 167, 22 S. W. 1104; Ramsey v. Wood, 57 Mo. App. 650; Id., 47 Mo. App. 465; Perry v. Hill, 36 Mo. App. 685, and Wooldridge v. Rentschler, 62 Mo. App. 591. The discrepancies between the petition, the order of the court and

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the commissioner's report in describing the course of the new road, had no bearing on the court's jurisdiction; and especially had they no bearing so far as protection to the defendant by its order to close the old road is concerned. No doubt a county court must open a road according to the route petitioned for and cannot materially diverge from that route. If it does its orders will be treated as void on appeal. But such mistakes do not go to the jurisdiction of the court even in the particular proceeding, which, as stated, depends on the petition and notice. It would appear, therefore, from what has been said, and the authorities cited, that the jurisdiction of the Texas County Court, to act in this road proceeding when it undertook to make orders, is invulnerable to collateral attack; and if the protection of the defendant by the writ he acted under depended on the jurisdiction of the court over the particular matter, nevertheless he would be protected well.

But we understand the jurisdiction required to protect an officer who acts pursant to the mandate or process of either a superior or an inferior court, is jurisdiction over the subject-matter; that is, power to deal with matters of the general class within which the particular proceeding falls. This we think is true when the officer acts pursant to a writ which is fair on its face and contains nothing to show the court acted without jurisdiction of the particular cause. [Savacool v. Boughton, 5 Wend. 170; Throop, Public Officers, sec. 757; Mechem, Public Officers, sec. 768 and cases cited.] A ministerial officer, such as a sheriff, constable, or highway overseer, is bound to execute a process put into his hands and is neither required nor allowed to look behind his writ to ascertain whether it is founded on a valid judgment. He is only bound to see that it was issued by a court having jurisdiction over the subject-matter. It is said a process fair on its face is such a one as appears to be lawfully issued

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from a court, magistrate or body having authority to issue writs of that nature and containing nothing on its face to notify or fairly apprise the officer that it was issued without authority. [Cooley, Torts (2 Ed.), 538; Throop, Public Officers, 758; Milburn v. Gilman, 11 Mo. 64; Rousey v. Wood, 47 Mo. App. 465, 472; Howard v. Clark, 43 Mo. 348; Melcher v. Scruggs, 72 Mo. 406; St. Louis & S. F. Railway v. Lowder, 138 Mo. 533, 39 S. W. 799.] In Butler v. Barr, 18 Mo. 357, the only justification relied on by the defendant for opening a road through the plaintiff's land was his appointment as road overseer and the order of the county court establishing the road. No process was put into that defendant's hands commanding him to open the road, yet he was held protected as he acted officially, unless he departed from the order of the court. The present defendant is admitted to have acted under a warrant which commanded him to close the road he closed.

The instructions of the court practically made the defendant guilty no matter how fair his process, if the county court ordered the new route opened and the old one closed before the route had been examined and located by the road commissioner, or before the road commissioner had reported that the money had been paid with which to construct the new road or that the road had been constructed by the petitioners. It also made the defendant guilty if the road he was ordered to open differed from the one petitioned for. How he could be guilty of a crime in obeying an order to close part of an old road, because the county court erroneously ordered a new road opened different from the one petitioned for, is not easy to see. Under the rulings of the circuit court the order of the county court to the defendant, no matter what it commanded nor how fair it appeared, was no protection and he was bound, before executing it, to go over the county court's orders and proceedings and ascertain their validity. In

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other words, he executed the writ at his peril. We do not understand this to be the law. The order issued by the county court in this proceeding, commanding him to close the old road, protected him. As authority is given to county courts, not only to open new roads, but to change old ones over certain parts of their courses, the power to change implies the power, not only to open the new course, but to vacate the old one. [15 Am. & Eng. Ency. Law (2 Ed.), p. 392, 404 and citations.] It is our opinion that as the warrant under which the defendant acted was, as far as appears, fair on its face and issued by a court having jurisdiction of the subject-matter, and as he obeyed it in the performance of his official duties, he should have been acquitted. The judgment is reversed.

All concur.

STROTHER, Respondent, v. McMULLEN LUMBER COMPANY, Appellant.

St. Louis Court of Appeals, February 21, 1905.

1. **SALES: Pleading: Counterclaim.** In an action on a contract for balance due for lumber sold by plaintiff to defendant, the defense that there was a previous shortage in delivery of other lumber bought under the same contract, was not permissible unless pleaded by way of recoupment or counterclaim.

2. ———: **Settlement.** Where the quantity o. lumber delivered under a contract was ascertained by two inspectors, one furnished by the purchaser and one by the seller, in the absence of fraud or collusion between the seller and the inspectors, the purchaser could not properly claim a shortage in the quantity delivered when sued for a balance due.

3. **PRACTICE: Abandoned Issue.** A defendant can not properly assign as error in the appellate court the action of the trial court in overruling a motion to strike out part of plaintiff's replication filed to an answer which the defendant abandoned before the trial.

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Appeal from Pemiscot Circuit Court.—*Hon. Henry C. Riley*, Judge.

Affirmed.

Geo. H. Peaks, Faris & Oliver and *Jones, Jones & Hocker* for appellant.

(1) The court erred in giving, of its own motion, instruction numbered one. This instruction is identical with instruction numbered 4, offered by defendant and refused by the court in the form offered. The court, against objections of the defendant, added to said instruction numbered 4, the words "as full payment" after the word "accepted" and gave the instruction as modified. Robinson v. Railroad, 84 Mich. 658; Perkins v. Headley, 49 Mo. App. 556; Grumley v. Webb, 48 Mo. 562; Coal Co. v. St. Louis, 145 Mo. 651, 47 S. W. 563; 1 Cyc. 333, and note. (2) Instruction number 3, given for the plaintiff is erroneous because it peremptorily instructs the jury to find for the plaintiff in the sum of $440.36, in the very teeth of the fact, that the matter about which they were instructed was in issue under the pleadings. So the jury should have been left free to pass upon this question of fact, and to either believe or disbelieve, the plaintiff's evidence as it saw fit; this instruction changes the burden of proof by requiring them to find for the plaintiff unless they find that the affirmative defense of payments has been proven. It is erroneous, because it ignores the legal effect of the acceptance of the check, after the dispute and controversy as to the amount due Strother. The acceptance of this check under the facts and circumstances shown constituted accord and satisfaction. Grumley v. Webb, 48 Mo. 562; Dry Goods Co. v. Goss, 65 Mo. App. 55; Dalrymple v. Craig, 70 Mo. App. 149.

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C. G. Shepard and *Brewer & Collins* for respondent.

(1) The question of the rescission of the contract was only raised in the pleadings by replication to the defendant's answer, which answer the defendant abandoned by obtaining permission of the court to withdraw said answer and afterwards filing the answer of November 24, 1903, on which the defendant went to trial. Young v. Woolfolk, 33 Mo. 110; Ticknor v. Voorhies, 46 Mo. 110; St. Louis v. Gleason, 15 Mo. App. 25; Rand v. Grubb, 26 Mo. App. 591; Castleman v. Castleman, — Mo. —, 83 S. W. 757; Hawkins v. Massie, 62 Mo. 552; Scovill v. Glasner, 79 Mo. 449; Hill v. Moris, 21 Mo. App. 256; Herley v. Railway, 57 Mo. App. 675. (2) The testimony of Strother shows the check referred to in said instruction was given for hauling and loading lumber on barge, and not for hauling lumber to Holland, for which hauling to Holland, only, plaintiff sues, and the testimony of the witness, Cronan, does not show accord and satisfaction, for it nowhere appears from the testimony that the defendant tendered plaintiff said check upon condition that plaintiff accept the same in full satisfaction. The mere fact that the check recites balance due on lumber delivery accounts does not show that plaintiff accepted same as full satisfaction of account sued on. This being the case, this check was a mere receipt and, therefore, open to explanation by parol testimony. It was, therefore, a question for the jury. Griffith v. Creihton, 61 Mo. App. 1; Dry Goods Co. v. Goss, 65 Mo. App. 55; Cole Co. v. Dallmeyer, 101 Mo. —.

GOODE, J.—The plaintiff is in the sawmill business in Pemiscot county and the defendant is an incorporated company engaged in buying and selling lumber in various localities, with its chief business office in Chicago. The defendant was incorporated in 1901;

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but prior to that time had been doing business as a partnership under the same name. Strother sold lumber to the partnership during the two years it was in existence and afterwards sold to the corporation. These transactions extended over four or five years; perhaps longer. The defendant corporation claims to hold by assignment from the partnership, all the rights of said partnership under the contracts between it and Strother. The materiality of this statement will appear. There were contracts between the defendant corporation and Strother by which the former was to buy from Strother all the lumber cut at one of his mills at stipulated prices. Strother was to deliver the lumber free on board cars, and another term of the contract was that the defendant might retain from the contract price of each delivery of lumber, eighty cents per one thousand feet to pay for hauling and loading the lumber on the cars if Strother should fail to load it. If Strother loaded the lumber himself, this money was then to be paid to him. As a rule, payment for deliveries of lumber were made every fifteen days, but occasionally the interval between the payments was over a month. The present action is based on the last of the four contracts between Strother and the lumber company, entered into January 25, 1902. A great deal of lumber was purchased by the defendant under that contract and paid for. The purpose of this action is to recover two items. One of the items amounts to $747.67, which sum is alleged to be due the plaintiff as the aggregate of sums withheld from the purchase price of 934,593 feet of lumber sold and delivered by the plaintiff to the defendant during July, August and September, 1902. It is stated in the petition that the defendant withheld eighty cents per one thousand feet from the price of said quantity of lumber, or the total sum of money above mentioned, to reimburse the defendant for hauling and loading the lumber on cars; that in truth Strother loaded all the lumber himself

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and thereupon became entitled to be paid said balance of the purchase price, but the defendant refused to pay it. The other item is for the cost of 30,369 feet of ash lumber sold and delivered to the defendant during August and September, 1902, and amounting, at the prices stipulated in the contract for different grades of ash lumber, to $495.05. Of the first item of $747.67 (the balance of the purchase price alleged to have been withheld to cover the possible expense of loading lumber), the defendant conceded the sum of $307.27 to be due the plaintiff and liability for that amount was confessed at the trial. The defendant denied it owed the balance of said $747.67; so as to that item there was in issue the sum of $440.40. It is necessary to state the grounds of the defendant's contention that it owed part of the item but not the balance. The part it admitted owing ($307.27) was withheld from the amount of the invoices of lumber delivered after August 18, 1902; whereas, the sum it denied owing ($440.40) is alleged by the plaintiff to have been withheld from the amount of invoices delivered prior to August 18, 1902. Now it is the contention of the defendant that a dispute arose between it and Strother, prior to the date just named, as to how much money was owing Strother on account of sums retained by the defendant from the purchase price of lumber plaintiff had delivered up to that date; that to settle this dispute Strother went to Cairo, Illinois, where defendant's superintendent Cronan was, and he and Cronan then and there adjusted and compromised that dispute by an agreement that the actual amount owing on said account at that date was $67.50; which sum the defendant then paid to plaintiff in full settlement and discharge of the disputed matter. Strother, on the contrary, contends that the dispute which was settled August 18, 1902, related only to one load of lumber shipped by barge and had nothing to do with reservations from the purchase price of prior deliveries of lumber which was loaded

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on cars. Practically the only issue in the case to be tried and decided by the jury was what the settlement of August 18 covered. This will become obvious from a statement of the controversy in regard to the item claimed by the plaintiff for ash lumber delivered in August and September. The defendant did not deny that plaintiff had sold and delivered to it, as alleged, 30,369 feet of ash lumber in August and September, 1902, or that the aggregate price of it was, as claimed, $495.05. The defense sought to be interposed against a recovery of that item was that during the transactions under the various contracts between the plaintiff and the McMullen Lumber Company prior to those months, the lumber company had bought a great deal more ash lumber from the plaintiff than plaintiff had delivered to it, and was entitled to be relieved from paying for the 30,000 feet delivered in July, and August, 1902, because previously, a shortage greater than that quantity had occurred in the transactions with the plaintiff. This shortage was attempted to be traced, not only under the contracts with the plaintiff and the incorporated company, but under the contracts between the plaintiff and the partnership, on the theory that the partnership had assigned to the corporation all the rights it had under contracts with the plaintiff. This attempted defense was inadmissible for two reasons: It could have been set up only by an answer pleading the shortage by way of recoupment or counterclaim. But the answer on which the defendant went to trial contained nothing but a general denial and a plea that the defendant had fully paid plaintiff for all lumber bought of him and all sums due the plaintiff for hauling and loading lumber. Under this answer plaintiff had no notice that the defendant would endeavor to recoup for a shortage in deliveries of lumber extending over years, and evidence to establish such a defense was inadmissible. Moreover, the uncontradicted testimony showed that in the

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course of all the dealings between these parties the quantity of lumber delivered was ascertained by an inspector furnished by the defendant, co-operating with one furnished by the plaintiff, and that settlements were made, generally every fifteen days, and always within a month, according to the report of the inspectors. In the absence of some showing of fraudulent collusion between the plaintiff and the inspectors which resulted in swindling the defendant, the settlements for prior deliveries of ash lumber closed those several transactions and a shortage in the quantity delivered could be no defense to this action. Plaintiff was entitled to a peremptory instruction to the jury to find in his favor for the ash lumber delivered to the defendant during the months of July and August, 1902, and the court rightly gave such an instruction.

Plaintiff was, of course, entitled to recover the $307.27, which the defendant admitted to be due him for money withheld from the price of lumber delivered after August 18, 1902, to cover the cost of loading said lumber on cars. It, therefore, appears that, as stated, the only issue to be decided was whether the settlement of August 18, 1902, was intended to cover the sums withheld by the defendant from the price of lumber delivered up to that date for shipment on cars, or was, as plaintiff said, an adjustment of a dispute about a single barge shipment. It should be stated that occasionally lumber was shipped by barge, instead of railroad, to points designated by the defendant. On that issue the court instructed the jury that they should find for the plaintiff in the sum of $440.36, for hauling and loading lumber on cars from July 7, to August 18, 1902, unless they found the defendant had paid plaintiff therefor, and that in said connection the check offered in evidence was a mere receipt and not conclusive that the defendant had paid the plaintiff for hauling and loading said lumber between those dates. To save figuring the quantity of lumber delivered by

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August 18, the parties filed a written stipulation at the trial that it was 530,495 feet, and at eighty cents a thousand feet there must have been withheld by defendant from the price of that lumber the sum of $440.39, or three cents more than the court instructed the jury to find in case they found plaintiff had not been settled with previously on said demand. For the defendant the court instructed that if the jury found from the evidence there was a dispute over the amount due the plaintiff at the time he took the check shown in evidence, and purporting on its face to be payment in full for lumber delivered to August 18, 1902, and plaintiff thereafter accepted it as payment in full and collected said check, that said check was payment in full for all money for hauling and loading lumber up to said date and the verdict for any sums for lumber sold prior to that date must be for the defendant. There is a discrepancy between this instruction as it is contained in the transcript of the record and the defendant's statement about it in the brief. The record shows the instruction was given in the form the defendant requested. It submitted the essential question on the particular matter in dispute, namely: whether or not plaintiff took the check in payment of what was owing him on account of money withheld by defendant prior to August 18, to cover cost of loading lumber on cars.

Exceptions were saved to certain rulings on the evidence; chiefly excluding attempts of the defendant to prove a shortage in the quantity of ash lumber delivered prior to 1902. We hold evidence of that kind was incompetent as the shortage was, under the pleadings, no defense.

Complaint is made of remarks by plaintiff's attorney in addressing the jury. We find nothing in the record about this assignment of error.

The trial court is said to have erred in overruling a motion to strike out part of plaintiff's replication.

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The replication was filed as a reply to a long answer which the defendant filed, in which it was pleaded in defense of plaintiff's action, that the defendant had been compelled to haul and load lumber on cars which plaintiff by his contract should have hauled and loaded; that defendant had paid out for such work $1,936.91 and judgment was prayed against plaintiff, by way of counterclaim, for $1,216.61, the difference between the amount due plaintiff on the contract and what defendant had paid because of plaintiff's failure to perform the contract. This answer was replied to and the defendant filed a motion to strike out part of the replication, which was overruled. Thereupon the defendant abandoned not only the first answer, but any defense based on the plaintiff's failure to perform his contract, and filed an answer consisting of a general denial and a plea of full payment to plaintiff of the sums claimed in the petition. In the light of the evidence it is plain that the averments of the original answer had no foundation in the facts. Of course, after the defendant abandoned the first answer and the defense pleaded therein, the ruling on the motion to strike out the reply to that answer became immaterial.

Most of the points raised on this appeal are frivolous. We have found no reversible error in the record. The judgment is according to the weight of the evidence and is affirmed.

All concur.

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SHAW, Respondent, v. ST. LOUIS, MEMPHIS & SOUTHEASTERN RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, February 21, 1905.

1. **RAILROADS: Injuring Stock: Jurisdiction.** The requirement of section 3839 of the Revised Statutes of 1899, that an action against a railroad company for killing or injuring animals shall be brought in the township in which the injury happens or in an adjoining township, is jurisdictional and the fact must affirmatively appear in the record in order that the suit may be maintained.

2. ——: ——: **Evidence.** In an action against a railroad company, under section 1106, Revised Statutes of 1899, for injury to a colt caused by its being frightened by a passing train so that it ran against a fence, evidence that the colt was found injured outside the right of way fence and had been seen inside the right of way in the morning of the same day, and that there was hair on the fence wire, was insufficient to support a verdict for plaintiff in the absence of evidence that it was frightened by a train or that it ran into the fence.

Appeal from Stoddard Circuit Court.—*Hon. J. L. Fort,* Judge.

REVERSED.

James Orchard for appellant.

(1) The court should have sustained the defendant's demurrer to the evidence. It devolves on the plaintiff to prove that the colt came upon the railroad track at a point not enclosed by lawful fence; that it was frightened by a locomotive or a train of cars belonging to the defendant; that in consequence of such fright it ran into or against a fence or some other object (but in the case at bar it was alleged that it was

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a fence), and injured, which they wholly failed to prove in this case. Therefore, the court erred in refusing defendant's demurrer to the testimony. Perkins v. Railway, 103 Mo. 52, 15 S. W. 320; Geltz v. Railroad, 38 Mo. App. 579. (2) Plaintiff must allege and prove that the stock (in this case the colt) was injured in the township in which the suit was brought, or in an adjoining township. Briggs v. Railroad, 111 Mo. 175, 20 S. W. 32.

Ford & Green for respondent.

NORTONI, J.—Plaintiff instituted his suit before a justice of the peace for Duck Creek township, in Stoddard county, Missouri, praying damages against the defendant railroad company under section 1106, R. S. 1899, which is as follows:

"Whenever any live stock shall go in upon any railroad or its right of way, in this State, and the said railroad is not at such place or places inclosed by a good fence on both sides of said railroad, such as is by law required, and such stock, by being frightened or run by any passing locomotive or train on said railroad, shall be injured or killed by or because of having run against the fence on either side, or into any culvert, bridge, slough or mire, or other object along the line of said road, the railroad company shall pay the owner of any such stock so injured or killed the damage sustained."

Plaintiff recovered a judgment before the justice. Defendant appealed to the circuit court. In the circuit court plaintiff filed an amended petition upon which the case was tried by the court without the intervention of a jury. The amended petition alleged, among other things, that "plaintiff's said animal,

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while upon and near the defendant's said road, by reason of the negligence of the defendant, as aforesaid, was frightened and run by a passing locomotive and train of cars on defendant's railroad, and was injured because of having run against a barbed-wire fence on the side of its said road on account of being frightened by a locomotive and cars aforesaid." Continuing, the petition alleges, that the colt was injured, damaged, one eye destroyed and its body and legs badly cut and gashed, etc., by the barbed-wire fence.

Plaintiff testified in his own behalf that he was the owner of the colt in question, in the fall of 1903, when it was injured; that he did not see the accident which befell the colt; that at that time the railroad company was building a barbed-wire fence, in fact, had practically completed the fence along the sides of the right of way and had turned the corner running to the railroad at the crossing of the public road, "and they hadn't put in any cattle guards. It was all closed up except there were no cattle guards on either side of the crossing. I saw the colt three days after it was injured. It had one eye out, and was cut all to pieces —its left leg was cut clear into. I think the colt was damaged $35." The colt is still living but not worth anything.

George Scott, on behalf of plaintiff, testified that he was a section foreman on the railroad and knew the colt. "I saw the colt right after it was done, I reckon, but I didn't see the accident occur. The condition of the fence—they had started to fence it, and fenced up what they intended to, but they hadn't put in any cattle guards—they had a nice fence, but they hadn't put in any cattle guards—it was closed and the crossing was closed up, but hadn't put in the cattle guards, and I suppose there was nothing to keep him from getting on the railroad track. The colt was on the outside of the enclosure when I saw it. It had the appearance of being recently cut. I noticed hair on the wire. I could

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not say whether or not it was cut by the wire. It was a wire fence with four strands of wire. I passed there twice a day and felt like it was my duty to examine the colt as the other foreman wasn't present. I examined it." Witness describes the same injuries as did plaintiff, and estimated the damage at $25.

On cross-examination witness testified as follows: "The colt was outside the fence when I saw it, right close to the fence.

"Q. You don't know whether or not, it ever got on the right of way? A. It was that morning.

"Q. It was that morning? A. Yes, sir.

"Q. You never saw it on the inside that evening? A. No, sir. The mare was on the inside and the colt on the outside. The fence was barbed-wire — four strands of wire.

"Q. How far apart were they? A. I couldn't say for certain— looked like might be fifteen or eighteen inches.

"Q. How big was the colt? A. It was a good sized sucking colt. There was hair on the wire but I could not tell whether or not the colt went through the fence."

B. F. McClure testified that he knew plaintiff owned the colt. "I don't know where it was injured at, only from what I heard. I saw it a couple of days after it was injured. The road was closed except there were no cattle guards, there was nothing to keep cattle from going on the track.

"Q. Did you see the colt on the inside of the grounds there? A. No, sir.

"Q. I will ask you if you saw any place there where it had the appearance of the colt running against the barbed-wire? A. No, sir."

The colt was of medium size, worth about thirty-five dollars. The damages were the worth of the colt. The above excerpts set out all the material portions of the evidence.

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At the conclusion of the evidence on the part of the plaintiff, defendant asked the court to declare the law to be that under the pleadings and the evidence plaintiff could not recover. This declaration of law the court declined to give. Defendant duly saved its exceptions. No further instructions or declarations of law were asked in the case on either side. The defendant declined to introduce any evidence. The trial judge, sitting as a jury, found the issues for the plaintiff and assessed his damages at thirty dollars. After unsuccessful motions for new trial and in arrest of judgment the cause comes here by appeal for review.

The question arising for decision is, allowing to the plaintiff, as a presumption, every inference that can be reasonably drawn from the testimony in his behalf, does the evidence support the finding of the court? It will be observed, first, that there is no evidence in this case that the colt was injured—in Duck Creek or an adjoining township in Stoddard county, or in any other township, so far as that is concerned; nor is there any direct evidence in the record that the colt was injured in Stoddard county, even. There is not a syllable in the record tending to show that the injury befell the colt in Duck Creek or in an adjoining township. For this reason alone, the case would be necessarily reversed and remanded.

Section 3839, Revised Statutes 1899, provides: "Any action against a railroad company for killing or injuring horses, mules, cattle or other animals, shall be brought before a justice of the peace of the township in which the injury happened or in an adjoining township." This was a jurisdictional fact and should affirmatively appear in the record. [Geltz v. Railroad, 38 Mo. App. 579; Briggs v. Railroad, 111 Mo. 168, 20 S. W. 32; King v. Railroad, 90 Mo. 520, 3 S. W. 217; Jewett v. Railroad, 38 Mo. App. 48; Backenstoe v. Railroad, 86 Mo. 492; Mitchell v. Railroad, 82 Mo. 106;

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Hansberger v. Railroad, 43 Mo. 196; Haggard v. Railroad, 63 Mo. 302.]

It will be observed that there is no evidence in the record as to the colt in question being seen upon the track or right of way, or inside the right of way fence, at any time after the morning of the day it was discovered injured in the evening. There is no testimony of footprints or other evidence that the colt either walked or ran into the fence, if frightened by the train as alleged.

There is no evidence that a train or locomotive was run upon the railroad on that day or any other day, in fact, there is no evidence in this record that the railroad company ever ran a locomotive or train of cars at any time over this road or that there was so much as a handcar ever at any time passed over the road.

There was no evidence that the ringing of a bell, the sounding of a stock alarm, or the noise of a passing train was heard on that day or on any other day on the road at this point, in fact, there is no positive or direct evidence in this record that there was a railroad in operation at said point.

There is testimony that some hair was discovered on the wire fence, but this circumstance is not followed by testimony showing that the hair thus found was like or resembled that of the colt in question, nor was it explained that the hair resembled that of a horse or some other animal.

There is no evidence of blood being found on the wire.

There is no evidence in the record to disclose whether the hair found on the wire had the appearance of having come from an animal inside or outside the fence.

We feel that the circumstances relied upon for a recovery in this case are not sufficient to support the verdict. There must be some connection between the facts proved and the fact at issue. "The basis of cir-

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cumstantial evidence is the known and experienced connection subsisting between the collateral facts proved, and the fact in controversy. 1 Greenleaf, Ev., sec. 11.'' [Perkins v. Railroad, 103 Mo. 52, 15 S. W. 320.]

The mere fact that the colt was found injured outside the right of way, near the fence, with the additional fact that it had been seen on the right of way the morning of the day it was found injured, and that hair was found on the wire, certainly would not authorize a recovery against this defendant, in the absence of some evidence showing that a train had passed and some evidence tending to show the fright of the colt and the consequent running into the fence, which is the gist of the action. Our Supreme Court has held that to make a case under this statute, the plaintiff must show, first, that the animal went in upon the right of way at the place alleged; second, that it was frightened by a locomotive or train of cars; third, that it was injured by running against the fence. [Perkins v. Railroad, supra.]

The reading of the statute alone is all that is necessary to arrive at this conclusion. In this case the first requirement was complied with, no doubt, by having shown by the section foreman that the colt was seen inside the right of way fence that morning, but there is certainly no evidence here tending to comply with the second requirement, that it was frightened by a locomotive or train of cars for there is no evidence that a locomotive or train of cars ever at any time passed over this road. The third requirement, to-wit, that it was injured by running against a fence, was certainly not complied with merely by showing that the colt was discovered near the fence outside the right of way and that there was hair on the fence. The evidence shows that the wires were so arranged that there was a space between of fifteen or eighteen inches. It might be that the colt attempted to pass through one of these spaces without a train being within twenty miles of the injury

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and thus injured itself. The railroad company could certainly not be held responsible for this. It appears that the mare was on the inside of the right of way and the colt on the outside. The colt may have wandered out from the right of way by way of the road crossing, no doubt where it came in, and later injured itself in attempting to go through the wire to join the mare inside. There is certainly nothing in this record to connect defendant in any way with this injury and to sustain the finding of fact upon such meagre and disconnected circumstances would require us to roam in the realms of conjecture and suspicion.

In Perkins v. Railroad, supra, a case under this same statute, the evidence showed that plaintiff's cow was found dead just outside the right of way with her foot entangled in the top wire of the right of way fence. Cattle tracks were found inside the right of way and two passing trains were heard to have given stock signals the day and night prior to finding the cow dead. The Supreme Court reversed the case and said: "While we might infer from this evidence that the cow was going out of the opening, and, in doing so, got entangled in the wire, it still devolved upon the plaintiff to show that she was frightened by the cars, and for that reason ran against or attempted to jump the fence." The case was reversed without remanding.

Our conclusion is that there was no evidence to support the finding in this case, hence it must be reversed. It is so ordered. All concur.

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BREWINGTON et al., Appellants, v. BREWINGTON et al., Respondents.

St. Louis Court of Appeals, February 21, 1905.

JURISDICTION: Title to Land Involved. Where the question at issue was whether minor children were entitled to retain and occupy a homestead until they become of age, although the value of the property had increased after the setting apart of the homestead so that it exceeded $1,500, or whether it should be sold and $1,500 set apart for the minors and the remainder divided among the owners in fee, was a question so far involving or affecting the title to real estate that the court of appeals would not assume jurisdiction.

Appeal from Madison Circuit Court.—*Hon. Robert A. Anthony,* Judge.

TRANSFERRED TO THE SUPREME COURT.

E. D. Anthony for appellants.

J. H. Chitwood, H. Clay Marsh and *David M. Tesreau* for respondents.

PER CURIAM.—This is a suit in partition, the parties being the descendants of W. P. Brewington, deceased. The common ancestor died prior to 1895, and during the year commissioners appointed by the probate court of Madison county set apart to his widow and minor children a portion of the land in controversy as a homestead. The homestead set off by the commissioners did not exceed 160 acres in quantity and was found by them not to exceed the sum of $1,500 in value. The action of the commissioners appears to have been approved by the probate court and acquiesced in by the parties in interest. This partition suit was brought in 1903, eight years later. Meanwhile the homestead has risen in value until it is worth $2,500 or $3,000. The matter controverted by the parties to this action is the

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right of the minor children of W. P. Brewington to retain the homestead notwithstanding its increase in value until they reach their majorities. The appellants insist that it ought to be sold, $1,500 of the proceeds invested for the use of the minor children and the balance divided among all the owners of the fee; whereas, it is insisted by counsel for the minor children that they have a right to retain and occupy the homestead until they are of full age, and the lower court so decided. All the lands in controversy are divided into three parts or farms, designated as tracts Nos. 1, 2 and 3. The homestead consists of parts of tracts 2 and 3, and the circuit court having ruled that it was not subject to sale for partition purposes, ruled further that the remainder of those tracts could not be partitioned in kind or sold without prejudice to the rights of all concerned, and, therefore, refused to adjudge partition of them. Tract No. 1 was ordered sold and the proceeds divided. All the rulings of the court appear to have been made with the consent of the parties, except the ruling that the homestead was not subject to sale until the minors came of age. With the suit in this posture, our jurisdiction is questioned on the ground that the title to real estate is involved. This is a point about which we are uncertain, but incline to the view that title is so far involved or affected that the case ought to be transferred to the Supreme Court as probably the tribunal having jurisdiction of it, This homestead is an estate vested by statute in the minor children. [Tiedeman, Real Prop. (2 Ed.), sec. 55.] We have in dispute the title of the minor children to the estate, they claiming that their title is good to the entire 160 acres until they are of age, no matter what the value of the tract; whereas, their adversaries assert that by reason of the increased value of the estate their title may be disposed of by a present sale. The cause is, therefore, transferred to the Supreme Court. It is so ordered. All concur.

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BREWER, Appellant, v. WHITE et al., Defendants; COMBES, Interpleader, Respondent.

St. Louis Court of Appeals, February 21, 1905.

SALES: Muniments of Title: Conclusion of Law. Where the right of a party asserting title to property rests on authenticated documents, and no fact is proven to cast doubt on the good faith of the transactions which led to the execution of the documents as muniments of title, their effect is a conclusion of law.

Appeal from Madrid Circuit Court.—*Hon. John H. Mott,* Special Judge.

AFFIRMED.

James V. Conran and *Russell & Deal* for appellant.

H. C. O'Bryan for respondent.

GOODE, J.—This is a controversy between James R. Brewer as plaintiff, and Voorhees Combes as interpleader. The main action, on which the interplea proceeding is engrafted, was brought by Brewer against W. H. White & Company of Terre Haute, Indiana, a firm composed of W. H. White, E. L. Dickenson and Gustav A. Consman. That action was for an alleged trespass by White & Company in entering on Brewer's land and cutting down and carrying off timber to the value of $500. After it was instituted Brewer sued out a writ of attachment and attached as the property of White & Company about 1,700 railroad ties, which had been cut, not on his land, but from another tract. Combes interpleaded for the ties, claiming he owned them when attached, and the evidence put his title beyond doubt. The ties were cut from a tract of land

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in New Madrid county, originally owned by John Moylan. Moylan sold and transferred the standing timber on that tract to White & Company by a writing dated November 25, 1901, giving the purchaser a license to enter on the land and cut the timber. On December 6, 1901, White & Company sold the timber which they had bought from Moylan to Noah H. Downing. This sale was evidenced by an instrument in writing. Afterwards Downing, by a written instrument, sold and assigned his right and title to the timber to the interpleader Combes. Delivery of possession accompanied all the sales. The checks given by the purchasers in payment for the timber were introduced and showed they had been cashed. No ties were cut while White & Company owned the timber, but part were cut while Downing was the owner and the remainder after Combes purchased. What the plaintiff relies on is that the sales by White & Company to Downing and by the latter to Combes were not in good faith but colorable and fraudulent. An attentive study of the evidence, which is all before us, has disclosed no statement or fact tending to support this position. We might not be able to assent to every ruling of the court. The main assignment of error is that the court refused to permit the plaintiff to prove that prior to the sale by White & Company to Downing and by the latter to Combes, he (Brewer) had asserted the demand against White & Company for the alleged trespass which is the subject-matter of the present suit. The court would not let the plaintiff swear to that fact, but it had already been drawn out in White's cross-examination and was in proof without any evidence contradicting it. No attempt was made to show that White & Company had any creditors in the strict sense of the word. The plaintiff's contention is that the sale and transfer of the timber out of which the ties were cut, was for the purpose of defeating his demand. If the ties were held by Combes in secret trust for the use of

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White & Company, plaintiff would be entitled to seize them for his demand. But there is nothing to show White & Company entertained a purpose hostile to the defendant when the sales occurred, or that, if entertained, Combes knew of it, intended to assist in carrying it out, or held the property in dispute for White & Company's use. The court would have been justified in instructing the jury to return a verdict in favor of the interpleader. His right to the ties rests on authenticated documents. No fact was proved to cast doubt on the good faith of the parties in the transactions which led to the execution of the documents as muniments of title, and their effect was a conclusion of law. [Fahy v. Gordon, 133 Mo. 414, 426, 34 S. W. 881.] Many witnesses supported the interpleader's ownership and none testified to an impeaching fact. Before Combes or White & Company had bought the timber from which the ties were cut, the plaintiff had sued on the present demand and been nonsuited. He began the present action after the purchase by Combes and elicited from the latter on cross-examination, that he knew nothing whatever of the plaintiff or his demand when he bought from Downing. There was no evidence for the jury to weigh, for though fraud may be found from circumstances and need not be proved directly, the finding must rest on proof and not conjecture. [Funkhouser v. Lay, 78 Mo. 458; Waddingham's Exr. v. Loker, 44 Mo. 132.]

The judgment is affirmed. All concur.

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HOWARD, Respondent, v. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Appellant.

St. Louis Court of Appeals, February 21, 1905.

1. **DAMAGES: Ejection of Train Porter: Notice.** In an action by a train porter against a railroad company for damages on account of injuries received in being ejected by the company's watchman, from a car in which he was sleeping at a terminal station, evidence that he and other porters had slept in the cars at the terminal stations for five years and that the company had issued an order forbidding them to do so, was sufficient to submit to the jury the question as to whether the company had knowledge of, and had consented to his sleeping in the car.

2. ——: ——: ——. If the plaintiff in such a case had been sleeping in the car at terminal points for a long time, with the implied permission of the railroad company, he could not be rightfully ejected from the car unless he had received proper notice that an order had been issued forbidding it.

3. **INSTRUCTION: Harmless Error.** An error in giving an instruction is harmless where it is in favor of the party complaining.

4. **DAMAGES: Injury to Nervous System.** Where plaintiff, in an action for personal injuries, testified that he was much affected, short winded, had severe pain in his breast in inclement weather, was not steady in his nerves, and lisped when talking, it was sufficient to authorize the jury to consider whether the plaintiff's nervous system had been injured.

5. ——: **Personal Injuries: Medical Attendance.** In an action for personal injuries, an instruction authorizing the jury to take into consideration the amount paid out for medical attendance, is error in the absence of evidence that the plaintiff had paid any expenses incurred in medical attendance.

6. **NEW TRIAL: Newly-Discovered Evidence.** A new trial upon the ground of newly-discovered evidence will not be granted, where such evidence does not go to the controlling issue in the case, and where it is not likely an opposite result will be reached on the merits if a new trial was granted.

Appeal from St. Louis City Circuit Court.—*Hon. James R. Kinealy*, Judge.

AFFIRMED, *si.*

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J. E. McKeighan, Edwin W. Lee and *William R. Gentry* for appellant.

H. E. Hofer, Phil H. Sheridan and *Henry B. Davis* for respondent.

STATEMENT.

The plaintiff, a colored train porter, then in employ of the Chicago & Alton Railway Company, brought this action for damages consequent on injuries inflicted upon him by a watchman of defendant in attempting to eject plaintiff from a car of which he was in charge, belonging to the Chicago & Alton Railway Company, while it was lying in the terminal yards of defendant, on the night of February 6, 1903. Plaintiff, in setting forth his cause of action, charged that on the date stated, as porter and while in discharge of his duties, he was in a car of the Chicago & Alton Railway Company which had been delivered by defendant at the union depot in the city of St. Louis, and as such porter had the right to enter the car and for many years prior he had enjoyed free access to the car at all times by day and by night, and in common with other porters of the railway company was permitted and did sleep in his car while on defendant's tracks at the union depot. That on the night in question, while he was asleep in the car, defendant by one of its duly appointed and authorized servants and agents entered such car and intentionally, illegally, wrongfully and maliciously committed an assault and battery upon the person and body of plaintiff, by striking him with a club and by firing the contents of a loaded revolver into his body to his great injury and suffering as detailed, and damages, compensatory and punitive were prayed.

In its defense, defendant made general denial and continuing averred that as a railroad corporation it

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owned and operated a large railroad yard, where many cars belonging to various railroad companies were received upon their arrival in the city of St. Louis and kept until their departure therefrom. That in the conduct of its business, it employed a night watchman whose duty it was to pass through the yards and protect the property of defendant and of other railroad corporations contained therein, and see that the rules of defendant were obeyed by all persons coming within said yard and enforce the rules of the various railroad companies, whose cars were in such yard, in so far as their rules affected the cars belonging to them and in such yard. That at the time, it was expressly forbidden by the rules and orders issued by the defendant and the Chicago & Alton Railway Company for porters or other persons to sleep in or occupy the cars belonging to the Chicago & Alton Railway Company while they were standing in the yard of defendant at night. That plaintiff knew such orders had been issued, or by the exercise of ordinary care in ascertaining the rules of the Chicago & Alton Railway Company, by which he was at the time employed as porter, he could have known that he or any other person was not allowed to occupy the cars of such railway company at night for the purpose of sleeping therein and knew, or by the exercise of ordinary care would have known, that he was not allowed by the rules of defendant to be in any car in its yards at night for the purpose of sleeping therein and on the occasion complained of by plaintiff, he was unlawfully and in violation of the rules of defendant and of the railway company occupying a car of the defendant in such yard at night and sleeping therein.

Proceeding, the answer recited that on this occasion, its night watchman, while in discharge of his duties as the servant of defendant, was making his rounds through its yard and the cars belonging to the various railroad companies therein, in obedience to in-

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structions to him issued by defendant for the purpose of enforcing the rules of defendant and of the Chicago & Alton Railway Company and to eject from the cars any persons found occupying the same in violation of such rules; that upon entering a car of this company this night watchman discovered plaintiff occupying it asleep or apparently sleeping, and aroused him, informing him he was violating the rules by sleeping in the car, and ordered him to leave it, which order plaintiff refused to obey and declared he would continue to occupy it, and the watchman insisting on obedience to his order, informed plaintiff that he would be back later on and plaintiff must leave the car or be ejected upon his return. That the watchman then left plaintiff and before returning reported plaintiff's conduct to the Chicago & Alton Railway Company's night foreman in the yard and was by him assured that the order and rule prohibiting porters from sleeping in such cars were in force and requested the watchman to enforce them. Returning later to the car where plaintiff was, the watchman found him still occupying it for the purpose of sleeping therein and again aroused him and ordered him to leave the car, which plaintiff in angry and threatening manner, with insulting language refused to do and thereupon the watchman proceeded to eject him from such car and used and intended to use no more force than was reasonably necessary to accomplish such purpose, but plaintiff resisted the attempt, used threatening and abusive language toward the watchman, and seizing an iron poker or bar in a threatening and angry manner advanced toward the watchman with such piece of iron uplifted, for the purpose of making an assault upon him and placed the safety and life of the watchman in imminent danger; that the watchman commanded plaintiff to stop and plaintiff continued to proceed in such a manner and while so proceeding to make such assault upon the

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watchman, the latter in necessary protection of his life and personal safety, fired one shot at plaintiff which took effect and caused him to cease attempting to assault him. The answer concluded with specific denial that its watchman struck plaintiff with a club or other weapon and affirmed that in so shooting plaintiff, the watchman employed only such force as was reasonably necessary for his own personal safety and for the protection of his life to repel the assault which plaintiff at the time was making upon him.

A reply denying the affirmative defenses completed the issues. A jury trial terminated in verdict for the plaintiff for $3,000, and this appeal ensued.

The testimony of plaintiff tended to establish the allegations of his petition and that he had been employed for several years as a train porter by the railway company designated on various runs, frequently changed, and while thus employed it had been his custom, whenever at a terminal point on line of the company, to sleep in the coach of which he was in charge, and he had never met any objection nor heard of any order or rule issued by the company prohibiting him or other porters from sleeping in its coaches. That on the night of February 6, 1903, he had arranged the seats of the chair car lying in the yard of defendant as a bed, and was asleep when the watchman entered between eight and nine o'clock, and asked him what he was doing there, to which he replied that he was porter of that car, came in on the train and was going to sleep in there, which the watchman in turn denied, stating that he was not, that he had orders that no one should sleep in the car, and plaintiff informed him he had been sleeping in the car for nearly five years, and no orders had issued that porters should not sleep in the cars and that he was going to sleep in there that night, the watchman then departing without exhibiting any evidence of his authority or official character. Between twelve and one o'clock, the watchman returned

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with a club, with which he was not armed on his first visit, and striking and cursing plaintiff ordered him out, stating that he had returned to put him out. Plaintiff replied he was not going out, that he was not going to stand around in the streets all night, he was the porter of the car, came in on it and was going to stay there. Thereupon the watchman struck him additional blows on the body and plaintiff told him if he struck him again he would get something and knock him in the head with it, and upon receiving a further blow he went to the stove, picked up the poker, and turned around facing the watchman, who shot him through the breast and lungs.

The evidence introduced by defendant tended to prove that the trainmaster of the Chicago & Alton Railway Company, in control of its train porters had issued, in the month of November prior to the occurrence, an order prohibiting its porters from sleeping in its coaches at terminal points; that pursuant to such order of this trainmaster, the assistant and night foreman of such railway at St. Louis placed in hands of an agent of defendant a key to its coaches and requested defendant to eject all porters found sleeping in its equipment at night; that this key and message were delivered to defendant's night watchman, who found the plaintiff in the coach, and informed him of his position and the orders; that plaintiff declined to go, whereupon the watchman told him he had put a man out the night before without trouble, and he did not want any trouble with him, and he would return expecting to find him out of the car, and plaintiff repeated he was going to remain in the car. After consulting the assistant yard foreman of the railway company and being instructed by him that there were orders against porters sleeping in their cars, he returned, found plaintiff apparently sleeping, and spoke to him without receiving an answer, and then poked his legs with his stick and aroused him; that he again

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said he was not going out and the watchman answered he came to put him out, and plaintiff retorted there was going to be serious trouble and the watchman stepping back drew his pistol from his pocket, upon seeing which, applying a vile epithet and exclaiming "you will have to kill me now, you or I will have to die in this car," plaintiff rushed back to the door and came on with the poker in his hands, when believing his life was endangered, the watchman shot him, causing him to fall into a seat.

The general course of the Chicago & Alton Railway Company's trainmaster to post upon a bulletin in his office all orders affecting the government of railroad porters was permitted to be shown, but its trainmaster could not testify positively that the order in question had been so posted, and plaintiff while admitting that, as was his duty, he examined every few days the bulletin board and read all posted orders, denied ever seeing such order.

BLAND, P. J. (after stating the facts).—1. The contention of appellant is that there is no evidence that the Chicago & Alton Railway Company expressly consented that its porters might sleep in its cars at terminal stations, and that there is a very important element of implied consent not present in the case as shown by the entire record, that is, the element of knowledge on the part of the Chicago & Alton Railway Company, through some of its officers. This contention of appellant, I think, is not borne out by the evidence. If plaintiff, as he testified, had been sleeping in these cars for five years, and other porters had been doing the same thing, these facts of themselves warrant an inference that the officers of the railway company had knowledge of the fact. It can hardly be supposed that these porters slept in the cars belonging to this company for four or five years and the officers of the company were ignorant of the fact. And the fact

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that the order was issued prohibiting trainmen from sleeping in the cars presupposes that the company had some knowledge or information that they were in the habit of doing so, and hence I do not think the court erred in submitting this question to the jury. If the plaintiff by expressed or implied permission of the railway company had been sleeping in its cars at terminal points for a long time, then he could not be rightfully ejected on the night he was shot, unless the prohibitory notice had been posted on the bulletin board at Chicago (where the evidence shows such notices are posted for the information of all trainmen) or unless he was informed by some one authorized to speak for the company that the order had been issued.

2. The proviso at the end of the instruction, to the effect that if the jury believed from the evidence that the watchman who shot plaintiff was not acting in obedience to any order given him by his foreman pursuant to request from the Chicago & Alton R. R. company, is in the teeth of the evidence, nor does it correctly declare the law of the case. The watchman, according to the evidence, was acting under orders from the defendant company and was, according to his evidence, attempting to carry out his orders and shot the plaintiff in self-defense. If he had no orders to put persons out of the cars, then the defendant would not be liable, however wanton or reckless he might have been, for he would have been acting beyond and outside the scope of his employment. The proviso, however, is against the plaintiff and in favor of the defendant and for this reason furnishes no ground for reversal. The second instruction is in harmony with our view of the law of the case and is correct as far as it goes.

3. The following clause in the instruction on the measure of damages "for any injury the jury find from the evidence he suffered in his nervous system, if any, and for any reasonable sum paid out by him

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for medical attention,'' appellant insists is not supported by any evidence. Speaking of the effect of his injury, plaintiff said: ''It has affected me very much; it has affected my wind, very short-winded now, and at the inclemency of the weather I have severe pain right in that breast (indicating) it goes right through me. I am not as steady in my nerves as I were before, I know that. I always lisped a little in talking, but I am much worse since I have been shot.'' I think this evidence was sufficient to authorize the jury to consider whether or not any injury to plaintiff's nervous system had been caused by the shock. In respect to medical attendance, plaintiff testified that he employed a physician in Chicago (to which city he went after leaving the hospital in St. Louis) who had paid him a great many visits; that he frequently went to the doctor's office for treatment and was still taking a tonic prescribed by him; that he did not know how much he owed the doctor; that he had been his family physician for ten years and that he had paid him some on account of the treatment for his injury but not all that he owed him. Dr. Nietert testified that fifty dollars would be a reasonable charge for the services of the Chicago physician. The instruction authorized the award for what had been *paid out* by plaintiff for medical attendance and did not embrace the expenses incurred on account of medical attention made necessary by the injury. The evidence does not show what sum plaintiff paid out, and under the instruction the jury was authorized to guess at the amount or else entirely ignore this element of damages. Whether it guessed an amount and incorporated the same in its verdict or omitted to find anything paid out for medical services is left to conjecture. This portion of the instruction is clearly erroneous for want of any definite evidence as to the amount paid out by plaintiff for medical services.

The witness on whom defendant relied to prove

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that the prohibitory notice had been posted, on cross-examination, showed that his memory was not clear on the point and he was not positive that the notice was, in fact, posted. In its motion for new trial, defendant filed an affidavit to the effect that it was misled and deceived by the evidence of this witness in respect to the posting of the notice, and filed affidavits of other persons, not witnesses at the trial, showing that the notice had been posted and had been brought to the actual notice of the plaintiff, and on the strength of these affidavits moved for a new trial on the ground of newly-discovered evidence. The refusal to grant the new trial is assigned as error. The right of plaintiff to recover is not dependent upon whether or not the notice was posted or whether or not he had actual notice of it, but on the excessive force that was used to eject him from the car. In fact, his right to recover hinged, in the main, on whether the watchman shot him in necessary self-defense or acted wantonly and recklessly. That this was the controlling issue in the case is shown by the instructions given for both parties and it is not likely an opposite result would be reached on the merits if a new trial should be granted. Where this is the case it is not error to refuse to grant a new trial. [Mayor of Liberty v. Burns, 114 Mo. 426, 19 S. W. 1107, 21 S. W. 728; State v. Stewart, 127 Mo. 290, 29 S. W. 986; Dean v. Chandler, 44 Mo. App. 338; Madden v. Realty Co., 75 Mo. App. 359.] New trials on the ground of newly-discovered evidence are not favored. [State v. Bybee, 149 Mo. 632.]

The evidence shows that the value of the medical attention given plaintiff by the physician he employed in Chicago was fifty dollars. On this evidence fifty dollars was the maximum sum the jury could have allowed for medical services, hence if this amount is deducted from the judgment, the error in the instruction on the measure of damages will not prejudice the defendant. Wherefore it is considered that if within ten

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days the plaintiff, in writing, remit fifty dollars of the judgment, the same shall stand affirmed for $2,950; if the remittitur be not made the judgment will be reversed and the cause remanded. All concur.

STATE OF MISSOURI, Respondent, v. BARNETT, Appellant.

St. Louis Court of Appeals, February 21, 1905.

1. **DRAMSHOP-KEEPER: License: Admissions.** In a prosecution of a dramshop-keeper for the violation of the provisions of the dramshop act, the admission of the defendant, on the trial of the case before the justice of the peace, that he had a license, was competent evidence and sufficient to show that he was a licensed dramshop-keeper.

2. **———: Music in Dramshop.** Where the building in which a dramshop was kept was partitioned off into separate rooms, one of which was used for a barroom and another used in connection with the barroom as a sitting room with an opening between, the suffering of musical instruments to be played in the sitting room was a violation of section 3018 of the Revised Statutes of 1899.

3. **PRACTICE: Error Self-Invited.** A theory of law adopted by both sides in the trial of a case, though erroneous, furnishes no ground for a reversal of the case.

4. **———: Impeaching Witness.** Where the facts testified to by the State's witness in the prosecution for a crime were shown substantially by the witnesses for the defendant, the refusal of the court to allow the defendant on cross-examination to show such witness for the State was prejudiced, was not prejudicial error.

5. **———: Remarks of Counsel: Timely Exception.** Objectionable language used by an attorney can not be reviewed by the appellate court, unless the attention of the trial court was called to such language and proper objection made.

6. **JUROR: Competency: New Trial.** A new trial in a criminal prosecution should not be granted on the ground that a juror was akin to witnesses for the State, where they are not shown to be prosecuting witnesses.

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Appeal from Pemiscot Circuit Court.—*Hon. Henry C. Riley*, Judge.

AFFIRMED.

C. G. Shepard for appellant.

(1) The court erred in overruling the demurrer to the evidence offered by defendant at the close of the State's testimony. State v. Lentz, — Mo. —, 83 S. W. 970; State v. Heckler, 81 Mo. 417; State v. Kurtz, 64 Mo. App. 123. (2) The defendant was not responsible for the criminal acts of his agents when made against his orders, and the main point in this case was whether or not defendant in good faith had instructed his agent, Billie Barnett, not to allow music about the premises, and the court erred in not allowing defendant to tell to the jury the reason why he was so particular in giving the instructions at the time and all the facts connected with the matter. State v. Riley, 75 Mo. 521; State v. Heinze, 45 Mo. App. 403; State v. Meagher, 45 Mo. App. 571; State v. Baker, 71 Mo. 475; State v. McKane, 110 Mo. 398, 19 S. W. 648; State v. Webber, 111 Mo. 204, 20 S. W. 33. (3) Defendant had a right to show to the jury the amount of interest witness Brasher was taking in this prosecution so they could intelligently weigh his evidence, and in refusing to let counsel for defendant interrogate him on this point on cross-examination, the court committed error, for which this case should be reversed. R. S. 1899, secs. 2637 and 4652; Harpence v. Rogers, 143 Mo. 653, 45 S. W. 650; State v. Pruett, 144 Mo. 92, 45 S. W. 1114. Instruction numbered four, given on behalf of the State, is vicious in this. It comments on the evidence, as well singling out particular facts, and it is error for trial courts to comment on the evidence or single out particular facts and call the jury's attention to them. Oneil v. Blase, 94 Mo. App. 648,

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68 S. W. 764; State v. Evans, 158 Mo. 589, 59 S. W. 994. (4) Robert Coppage was not a competent juror to try and determine this cause, for the reason he was a relative of both J. M. Brasher and Steve Pate, the two prosecuting witnesses that were taking such interest in the matter, and the trial court should have sustained defendant's motion for a new trial when this matter was brought to his attention. State v. Walton, 74 Mo. 270; State v. Stein, 70 Mo. 330; Price v. Protection Co., 77 Mo. App. 236; Billinger v. Transit Co., 82 S. W. 536.

L. L. Collins for respondent.

(1) The court did not err in overruling defendant's demurrer to the evidence, and in refusing to instruct the jury at the close of the State's evidence that their finding should be for defendant; first, because the information in this case is sufficient. R. S. 1899, sec. 3018, and, second, because whether or not appellant in good faith instructed his bartender not to permit or suffer music in appellant's dramshop was a question of fact to be submitted to the jury, and the burden of proof upon the question of good faith was upon the defendant. State v. Hickler, 81 Mo. 417; State v. Raily, 75 Mo. 521; Rex v. Almen, 5 Burr. 2686. (2) The court did not err in giving instruction numbered four on behalf of the State for the reason said instruction properly declares the law. State v. Heinze, 45 Mo. App. 403.

BLAND, P. J.—The defendant was prosecuted and convicted of a violation of section 3018 of the Dramshop Act, R. S. 1899. The section provides: "A dramshop keeper shall not keep, exhibit, use or suffer to be kept, exhibited or used in his dramshop, any piano, organ or other musical instrument whatever," etc. The punishment for a violation of this section is by a

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fine not less than ten nor more than fifty dollars, and in addition thereto the section provides that the dramshop keeper shall forfeit his license and shall not again be allowed to obtain a license to keep a dramshop for the term of two years next thereafter. The jury assessed defendant's punishment at ten dollars and the court rendered judgment for the fine assessed, and a further judgment annulling his license. Motions for new trial and in arrest of judgment proving of no avail, defendant appealed.

On the part of the State the evidence is that the defendant kept a dramshop at Cottonwood Point, Pemiscot county, Missouri. The building occupied as a saloon was divided into three compartments; in the front one is the barroom, in the middle one, designated by the witnesses as the "stove room," was a heating stove and some cases of beer. The third or back room was used as a storage room for liquors in the original package. There is a door opening between the barroom and the "stove room" but no shutter. This room was used as a sitting room by the customers of the saloon. The State's witnesses testified that on the evening of October 3, 1904, a fiddle and guitar were played in the "stove room" from eight to eleven o'clock at night, and that dancing accompanied the music. The defendant's witnesses testified that the fiddling and picking of the guitar did not take place in October, but on the evening of September 19th or 20th, 1904, and that it continued but one hour, the dancing being done by a couple of negroes. The defendant's evidence also shows that no music was played at any time in the barroom and that defendant was not present on the occasion when music was played in the "stove room;" that the dramshop was run by his barkeeper, Bill Barnett, to whom he had given strict instructions not to permit any music to be played in the saloon. Bill Barnett confessed to having received such instructions from defendant but admitted that he dis-

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obeyed them by permitting music in the "stove room" on the evening of September 19th or 20th.

The court gave the following instructions for the State, to which defendant objected:

"3. The court instructs the jury if you believe and find from the evidence that the building in which the dramshop was kept was divided into or partitioned off into separate rooms, yet if you believe said different rooms were used by the defendant in connection with his barroom, said rooms constitute and were a part of such dramshop.

"4. The court instructs the jury that although you may believe from the evidence that the defendant instructed his clerk not to permit musical instruments to be kept and used in said dramshop, yet unless you believe he did so in good faith for the purpose of preventing said musical instruments from being kept and used in said barroom and not for the mere purpose of attempting to evade the law, you should convict the defendant."

The court gave the following instruction at the request of defendant:

"1. The court instructs the jury that if you find and believe from the evidence that defendant, William H. Barnett, in good faith instructed and ordered his barkeeper, Billie Barnett, not to allow any music in or about his said dramshop and that the said Billie Barnett, in violation of the orders of the defendant, permitted said music to be played in defendant's dramshop, then defendant is not liable for such violation of his orders by his agent or bartender, and you should find the defendant not guilty."

The defendant asked the following instruction which the court refused:

"The court instructs the jury that defendant is charged with having music in his dramshop; to constitute this offense the music must have been in the room or place where drinks were sold, or the business of a

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dramshop was carried on and unless you find and believe from the evidence in this case that music was permitted in the dramshop, you should find the defendant not guilty.''

To show that the defendant was a licensed dramshop keeper, the State proved by one witness that, on the trial before the justice (the case having been first tried before a justice and then appealed to the circuit court) the defendant stated to the justice that he had a dramshop license and produced the license, which the witness saw but did not read. The State, over the objection of defendant, also offered and read in evidence, from the records of the county court, an order of the court granting the defendant a license, the records showing that the license had been issued to him. The ground of the objection is, that the record was not the best evidence, that the license was the primary evidence and no notice having been served on defendant to produce his license, if he had one, the State could not offer secondary evidence. We discussed this identical question at the present term in the case of State v. J. Ira Barnett and do not deem it necessary to further discuss the question here. The admission of defendant that he had a license, on the trial before the justice, testified to by one witness, was sufficient to show that defendant was a licensed dramshop keeper, and the admission of the county court records, if erroneous, furnishes no sufficient ground for reversal.

2. The defendant complains of the instruction (No. 3) given for the State. The three rooms were all under one roof, on the same floor, separated only by thin board partitions through which were door openings; all three of the rooms were used by defendant in his saloon business, the ''stove room,'' in which the music was played, being heated for the accommodation of defendant's customers and was used by them as a sitting room when loafing about the saloon. This evi-

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dence, we think, clearly warranted the third instruction.

3. Defendant also complains of the fourth instruction given for the State. This instruction not only correctly declared the law but is in harmony with number one asked by and given for the defendant. A theory of the law adopted by both sides, though erroneous, furnishes no ground for reversal.

4. On cross-examination of Brasher, a witness for the State, defendant undertook to show that he was prejudiced against him by showing that the witness and others of his neighbors had agreed or conspired together to stop the dramshop business at Cottonwood Point, and that the witness had appeared before the county court and opposed the granting of a saloon license to defendant. The court refused to permit the defendant to show these facts. The only evidence given by Brasher was that he heard music in the saloon on the evening of October 3, 1904, and that it continued until about eleven o'clock. The defendant proved by his own witnesses that music was played in the "stove room" from eight until about nine o'clock on the evening of September 19th or 20th, 1904. The State was not confined to any particular day. It could prove the charge by showing that music was played in the saloon on any day within a year next before the filing of the information, so that the fact that the music was played in the saloon, as charged in the information, was as well shown by the defendant's witnesses as by the testimony of Brasher, and for this reason to have shown that Brasher was prejudiced against defendant was of no consequence in the case, and the error, if it was error, in denying the defendant the opportunity to show that Brasher was a prejudiced witness, was non-prejudicial.

5. Complaint is made of remarks attributed to the prosecuting attorney in his closing address to the jury. The record does not show that the objectionable lan-

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guage was objected to at the time it was used or that it was called to the attention of the court; unless this is done misconduct of any attorney in his remarks to the jury cannot be reviewed by an appellate court. [Massengale v. Rice, 94 Mo. App. 430, 68 S. W. 233; State v. Armstrong, 167 Mo. 257, 66 S. W. 961.]

In his motion for new trial, defendant alleges that Robert Coppage, one of the jurors, was incompetent for the reason he is akin to J. M. Brasher and Steve Pate, alleged to be prosecuting witnesses in the case. The information was sworn to by the prosecuting attorney. The names of Brasher and Pate, with two others, are indorsed on the back of the information as State witnesses, not however as prosecuting witnesses. Brasher testified on cross-examination that he filed the affidavit before the justice. The affidavit itself is not in the record, and for this reason we are not informed of its contents, however, we do know from the record that the affidavit was not used or filed in connection with or as a foundation for the information, and it does not appear by the information or by any paper in the case, or any way whatever, that either Brasher or Pate were prosecuting witnesses and for this reason the court very properly refused to grant a new trial on the ground that Coppage was akin to either of them.

There is abundant evidence in the record to support the conviction, and the judgment is affirmed. All concur.

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STATE OF MISSOURI, Respondent, v. BARNETT, Appellant.

St. Louis Court of Appeals, February 21, 1905.

1. **DRAMSHOP-KEEPER: Information.** Under the definition of a dramshop-keeper in section 2990 of the Revised Statutes of 1899, an information charging a dramshop-keeper with keeping his dramshop open on Sunday, in violation of section 3011, is sufficient to support a conviction, although the word "licensed" is omitted from the information.

2. ———: **License: Record of County Court.** In a prosecution of a dramshop-keeper for keeping his dramshop open on Sunday, the record of the county court granting the license to him is conclusive evidence that the license was granted, but is not evidence that the license was issued or delivered.

3. ———: ———: **Secondary Evidence.** The testimony of the county clerk that he issued the license, and his official memorandum containing a list of the licenses issued, are incompetent to prove the issuance and delivery of the license, in the absence of evidence showing that notice was given to the defendant to produce his license and a foundation thus laid for the introduction of secondary evidence.

Appeal from Pemiscot Circuit Court.—*Hon. Henry C. Riley*, Judge.

REVERSED AND REMANED.

C. G. Shepard for appellant.

In this case no attempt was made to introduce the license, if any was in existence; but the State relied solely on secondary evidence, which evidence is not admissible in any case until the primary evidence is shown to be lost, or not within reach of the court. State v. Heckler, 81 Mo. 417; State v. Kurtz, 64 Mo. App. 123; State v. Harmon, 106 Mo. 635, 18 S. W. 128.

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L. L. Collins for respondent.

(1) The information in this case is sufficient. State v. Braum, 83 Mo. 480, and authorities cited. (2) There is no merit in appellant's contention that the State failed to prove by competent testimony that appellant was a licensed dramshop keeper. State v. Kurtz, 64 Mo. App. 123.

BLAND, P. J.—1. Defendant was convicted and fined in the Pemiscot Circuit Court for selling intoxicating liquors on the first day of the week, commonly called Sunday, in violation of section 3011, of the Dramshop Act, Revised Statutes 1899. After taking the usual preliminary steps, defendant appealed to this court.

The information charged the defendant with having made the sale as a dramshop keeper. For the reason the term "dramshop keeper" is not preceded by the word "licensed," it is contended by the appellant that the information does not state facts sufficient to constitute an offense under section 3011, supra. By section 2990 of the Dramshop Act a dramshop keeper is defined to be "a person permitted by law, being licensed according to the provisions of this chapter (chapter 22) to sell intoxicating liquors in any quantity, either at a retail or in the original package, not exceeding ten gallons." Section 3011, for a violation of which defendant was convicted, prohibits any person having a license as a dramshop keeper to keep open such dramshop "on the first day of the week, commonly called Sunday." The information does not follow the language of the statute, in that it omits to state that defendant was a licensed dramshop keeper. It would have been better pleading if the information had followed the language of the statute creating the offense by alleging that the defendant was a licensed dram-

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shop keeper, however, the term "dramshop keeper" is defined by the statute (section 2990) as "a person permitted by law, being licensed according to the provisions of this chapter (22) to sell intoxicating liquors," etc. Under this definition the term "dramshop keeper," as used in the information, implies that the defendant had a license, and for this reason we think the information is sufficient to support the conviction. [State v. Shafer, 82 Mo. App. 58.]

2. To prove that defendant was a licensed dramshop keeper the State, over the objection of defendant, offered and read in evidence, from the records of the county court of Pemiscot county, an order of the court granting a dramshop license to the defendant, showing the date of issuance and expiration. This license expired prior to the alleged Sunday sale, and the State offered a record made by the clerk of the county court of dramshop license that had been issued thereafter, showing both the date of issuance and expiration. It appeared from this list that, on the expiration of the first license granted by the county court, a second license was issued by the clerk in vacation, which license was in force on the date of the alleged sale. The clerk also testified that he issued this license in vacation and that it was a renewal of the first or original license. The objection made to this evidence was that the license was the best evidence and unless notice had been served on the defendant to produce it at the trial, secondary evidence was not admissible. The county court is a court of record. The record of the order granting the first license shows that the defendant was a party to the proceedings resulting in the order; being a party thereto, he is concluded by the order and it was original evidence as against him. [1 Greenleaf on Evidence, sec. 522; Williams v. Mitchell, 112 Mo. 300, 20 S. W. 647; Gentry v. Field, 143 Mo. 399, 45 S. W. 286.] The order of the county court, however, did not contain the license, and for this reason was not evidence that one

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was issued. It only showed that a license had been granted to defendant, not that one had been actually issued and delivered. The clerk of the county court testified that a license was issued on the order, that it expired and he renewed the same in vacation, and read from a record or memorandum of licenses issued, kept by himself, which showed the date of the renewal license issued to the defendant and that it was in force at the date of the alleged sale. This list of licenses issued was nothing more than an official memorandum made by the clerk to which defendant was not a party, and it was not original evidence as against him. The license itself was the best evidence and should have been produced or its non-production accounted for. The case being a criminal one, defendant could not be compelled to produce his license, but this fact did not avoid the necessity of notice on him to produce his license, if he had one, in order to lay a foundation for the introduction of secondary evidence. [State v. Lentz, — Mo. —, 83 S. W. 970.]

The judgment is reversed and the cause remanded. All concur.

HENSON, Respondent, v. WILLIAMSVILLE, GREENVILLE & ST. LOUIS RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, February 21, 1905.

RAILROADS: "Locomotive." The term "locomotive" as used in section 1106 of the Revised Statutes of 1899, allowing damages for live stock which may be injured by being frightened by a locomotive or train at a place where the railroad is not fenced, does not apply to a "speeder," a vehicle in form like a hand-car but run by a gasoline engine.

Appeal from Wayne Circuit Court.—*Hon. F. R. Dearing*, Judge.

REVERSED.

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James F. Green and *John H. Raney* for appellant.

(1) To justify a recovery under the provisions of the statute, the stock injured must have been frightened by a locomotive or train. The car operated by defendant's employee was neither. R. S. 1899, sec. 1106; Perkins v. Railroad, 103 Mo. 52, 15 S. W. 320; Briggs v. Railroad, 111 Mo. 168, 20 S. W. 32. (2) The statute in question must be strictly construed. Defendant's instruction declaring that plaintiff was not entitled to recover should have been given. Stranahan v. Railroad, 84 N. Y. 314; Sutherland, Stat. Con., sec. 371; 13 Am. and Eng. Ency. of Law, p. 999; 1 Bouvier's Law Dictionary (Rawle's Ed.), 274.

O. L. Munger and *Charles M. Hay* for respondent.

(1) "The sum and object of all rules of statutory construction is to determine what was the general purpose sought to be accomplished by the law." Warren v. Barbee Paving Co., 115 Mo. 577. (2) Statutes requiring railway companies to fence their tracks have generally been held to be remedial, and hence they are given a liberal construction. Railroad v. Brubaker, 47 Ill. 462; Railroad v. Heflin, 65 Ill. 367; Tracey v. Railroad, 38 N. Y. 433.

STATEMENT.

The action is bottomed on section 1106, Revised Statutes 1899, which reads as follows:

"Whenever any live stock shall go in upon any railroad or its right of way, in this State, and the said railroad is not at such place or places inclosed by a good fence on both sides of said railroad, such as is by law required, and such stock, by being frightened or run by any passing locomotive or train on said railroad, shall be injured or killed by or because of having run against the fence on either side, or into any cul-

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vert, bridge, slough or mire, or other object along the line of said road, the railroad company shall pay the owner of any such stock so injured or killed the damage sustained.''

Plaintiff's horse went upon defendant's railroad track at a place where defendant was required by law to maintain fences but where there were no fences. The horse was frightened by what the witnesses term a ''speeder,'' running on the railroad track. After being frightened by the speeder, the horse ran down the track into a trestle and was injured and damaged. The speeder was in charge of Joseph Thompson, who was called as a witness for the plaintiff. In respect to the speeder, he testified as follows in describing the construction of the car:

''Q. It resembled a handcar, so far as being flat on top, did it not? A. Yes, sir.

''Q. Was there any cover on it? A. No, sir.

''Q. About what size wheels has it? A. I think they were between twelve and sixteen inches high.

''Q. How many wheels were on it? A. Two big ones and one small one.

''Q. It has two large ones on one side and a small wheel on the other? A. Yes, sir.

''Q. In the center of the car and underneath the floor of it there is a little gasoline tank, is there not? A. Yes, sir.

''Q. And while sitting there you ride out in the open? A. Yes, sir.

''Q. The car, I believe, is about the width of a railroad track? A. Yes, sir.

''Q. Now, it takes two or three men to run a handcar, does it not? A. Yes, sir.

''Q. Did you use this on the railroad in the place of a handcar? A. Yes, sir.

''Q. Because it could be operated more speedily and by one man? A. Yes, sir.

''Q. Is that true? A. Yes, sir.

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"Q. You were working for the Holladay-Klotz Land & Lumber Company? A. Yes, sir."

At the close of plaintiff's case defendant moved the court to instruct the jury that under the law and the evidence plaintiff could not recover. The court refused to so instruct and gave other instructions under which the jury was authorized to, and did, find for plaintiff. Defendant appealed.

BLAND, P. J. (after stating the facts).—The horse was not frightened by a passing train; was he frightened by a locomotive? To put the question in another form was the speeder, by which the horse was frightened, a locomotive within the meaning of the term as used in section 1106, supra?

In Fallon v. West End St. Ry. Co., 50 N. E. 536, s. c., 171 Mass. 249, it was held that the Laws of 1887, c. 270, sec. 1, cl. 3, making the employer liable for injuries to an employee resulting from negligence of a fellow-employee in charge of a "locomotive engine or train upon a railroad," relates to those operated or originally intended to be operated to some extent by steam, and does not include electrically propelled cars on street railways.

In Jarvis v. Hitch, 65 N. E. (Ind.) 608, it was held: "A machine which moves backward and forward along the track of a railroad, by its own steam power, and which, while it has not the weight, size, speed, nor power of an ordinary locomotive, was capable of and did the same work to a certain extent, and was also used for the purpose of driving piles, was a locomotive, within Burns' Rev. St. 1901, sec. 7083, providing that every corporation shall be liable for injuries to an employee caused by negligence of any person in the service of the corporation who has charge of any locomotive."

Section 4160, article 2, entitled "Construction of Statutes," R. S. 1899, provides that "words and

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phrases shall be taken in their plain or ordinary and usual sense.'' The word ''locomotive'' is used in conjunction with the word ''train'' in the section under review. When so used, the ordinary meaning of the term is the steam locomotive in common use by railroad companies for the purpose of moving their trains and cars, therefore, the machine or car by which plaintiff's horse was frightened is not a locomotive within the meaning of the section. It follows that the instruction in the nature of a demurrer to plaintiff's evidence should have been given.

The judgment is reversed. All concur.

BADER, Appellant, v. ST. FRANCIS LEVEE DISTRICT, Respondent.

St. Louis Court of Appeals, February 21, 1905.

1. **WATERCOURSES: Levee: Damages for Negligent Construction: Defense.** In an action for damages to plaintiff's land by reason of the improper construction of a levee so that it obstructed the flow of a bayou which drained a lake, thus causing plaintiff's land to overflow, the defense that the plaintiff's land was subject to overflow unless protected by the levee and that the overflow which caused the damage came so late in the season that it would have caused the damage in any event, was not available.

2. ——: ——: ——: **The Issue.** The gravamen of the case was that the levee should have been so built as not to obstruct the drainage of the lake and still have protected the land from overflow.

3. ——: ——: ——: **Limitations.** That the channel of the bayou had been obstructed many years before the damage in question occurred can not be considered as a defense in the absence of a pleading of the Statute of Limitations.

Appeal from Pemiscot Circuit Court.—*Hon. Henry C. Riley,* Judge.

REVERSED AND REMANDED.

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C. G. Shepard for appellant.

(1) The building by defendant of a solid embankment across the bayou mentioned, which was the natural and only drainage for a large scope of country, said bayou being a natural watercourse, and without preparing other means of damage was negligence *per se*, and the plaintiff was entitled to have his case submitted to the jury on the correct principles of law. Railway v. Shaw, 56 L. R. A. 341; Jones v. Railway, 18 Mo. App. 251; Sullivan v. Dooley, 73 S. W. 82. (2) Instruction numbered three, given at the instance of the defendant, is vicious in the extreme. It is void of all sense of equity and justice, and is directly in the face of the holding of the appellate courts of this State since the adoption of our Constitution of 1875. It deprives the plaintiff of the right to share the benefits in common with others, and forces him to stand the loss peculiar to his property alone. Newby v. Platte Co., 25 Mo. 258; Railroad v. Crystal, 25 Mo. 544; Railroad v. Richardson, 45 Mo. 466; Lee v. Railroad, 53 Mo. 178; Combs v. Smith, 78 Mo. 132; Daugherty v. Brown, 91 Mo. 26, 3 S. W. 210; Ruckert v. Railroad, 163 Mo. 260, 63 S. W. 814; Burgenstock v. Drainage Dis., 163 Mo. 198, 64 S. W. 149; Householder v. Kansas City, 83 Mo. 488; Railroad v. Knapp, Stout & Co., 160 Mo. 396, 61 S. W. 300; Hickman v. Kansas City, 120 Mo. 110, 25 S. W. 225. (3) Defendant was liable for any damage resulting from its failure to prepare sufficient drainage, and a township or municipal corporation is liable in damages the same as individuals. Benson v. Railroad, 78 Mo. 504; Jones v. Hannovan, 55 Mo. 462; Carson v. Springfield, 53 Mo. App. 289; McAskill v. Hancock, 55 L. R. A. 738.

Faris & Oliver for respondent.

There was no showing that the construction of the levee across Taylor bayou was the proximate cause of

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this filling up, but on the contrary this filling up of this bayou was directly shown to have happened four years after the building of this levee and to have been caused by a catastrophe not pleaded by plaintiff and wholly beyond the control of the defendant. Therefore, under the pleadings and proof it was incumbent on plaintiff, after he admited the incapacity of the bayou by reason of obstructions, to have shown that such obstruction was the proximate result of the defendant's negligence. Otherwise he cannot recover. Hicks v. Railway, 46 Mo. App. 309; 1 Sutherland on Damages, 23; Snelling v. McDonald, 14 Allen 292; Brown v. Railway, 20 Mo. App. 222; Clark v. Fairley, 24 Mo. App. 429; Christy v. Hughes, 24 Mo. App. 275.

GOODE, J.—This an action for damages for the flooding of plaintiff's land in the year 1903, the consequent destruction of fifteen acres of meadow and preventing plaintiff from cultivating one hundred and five acres of land which otherwise he would have cultivated. Plaintiff for many years has owned a farm in Pemiscot county on the shore of Half Moon lake. Prior to 1893, this lake was drained by Taylor bayou, a natural watercourse having well defined banks and emptying into the Mississippi river. In 1893, the defendant levee district, an incorporated body, constructed a levee to prevent the country from being overflowed by the Mississippi river, and in so doing built a solid earthen embankment across Taylor bayou which prevented the bayou from draining the lake. In 1903, high waters prevailed in that part of the country and Half Moon lake rose above its banks and overflowed the tillable land of the plaintiff's farm. It is alleged that the overflow was due to the damming up of the waters by the embankment built across Taylor bayou, and there was evidence to prove this was true.

Among other instructions the court told the jury that if they believed plaintiff's lands were subject to

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overflow from the waters of the Mississippi river unless protected by the levee and there was, during the year 1903, an overflow from the Mississippi sufficient in volume to cover the lands of the plaintiff if they were not protected by the levee, and that said Mississippi overflow came so late in the season that plaintiff could not have cultivated his land in 1903, the verdict should be for the defendant. This instruction was altogether erroneous. It lost sight of the gravamen of the case, which is that the levee should have been so built as not to obstruct the draining of Half Moon lake and still have protected plaintiff's farm from the overflow of the Mississippi river. Plaintiff was one of the parties who was taxed for the levee and expected to be benefited by it. What benefit would he receive by being protected from the overflow waters of the Mississippi, if the levee was built so as to turn the overflow waters of Half Moon lake on his farm? The very gist of the case was that there should have been such a construction that the bayou would have continued to drain the lake. The petition avers the submergence of plaintiff's farm by the high water in the lake was caused by the negligent and improper construction of the levee. Though the Mississippi river would have overflowed plaintiff's farm that year had there been no levee, it does not follow that he should be denied a recovery on account of the improper construction of the levee.

The instruction under review is scarcely defended, but it is insisted that the verdict is so obviously for the right party that the judgment ought to be affirmed. The argument in support of this proposition is that the plaintiff, as well as other witnesses, testified that Taylor bayou, between Half Moon lake and the point where the levee crossed it, had become so filled with sand and debris that it would not have drained the lake even if the levee had been open across the bayou. But the plaintiff testified, and he was corroborated, that the

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filling up of the bayou was due to the construction of the levee across it—that the solid embankment stopped the current of the waters of the bayou so that sand and mud accumulated between the embankment and the lake, choking the channel. If this was true, the failure of the bayou to drain Half Moon lake and the consequent overflow of plaintiff's land when the lake rose during the flood, were caused by closing the channel of the bayou with the levee. But it is said that this filling of the channel happened years before 1903 and, therefore, plaintiff had no right to recover for damages sustained that year. We would consider this argument if the Statute of Limitations had been interposed in defense of the action, but it was not. In disposing of the case as it is presented to us we must hold that prejudicial error was committed.

The judgment is reversed and the cause remanded. All concur.

BLOUNT, Respondent, v. CONNOLLY et al., Appellants.

St. Louis Court of Appeals, February 21, 1905.

1. **LANDLORD AND TENANT: Renewal of Lease: Specific Performance.** Where the habendum clause of a lease ran to the lessees and their assigns, a covenant of renewal ran with the land and the assignee of the original term could maintain an action to enforce the specific performance of the covenant to renew.

2. ———: ———: **Justices of the Peace: Injunction.** Where the landlord, at the expiration of the leasehold term, brought an unlawful detainer suit against the tenant before a justice of the peace, the latter could not set up his equitable right to compel a renewal in defense of the action, and his proper remedy was by action in the circuit court to enjoin and compel specific performance.

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Appeal from Washington Circuit Court.—*Hon. Frank R. Dearing,* Judge.

AFFIRMED.

M. E. Rhodes and *James F. Green* for appellants.

(1) Under the evidence in the case the decree should have been for defendants. Biddle v. McDonough, 15 Mo. App. 542; Hollman v. Conlon, 143 Mo. 378, 45 S. W. 275; Tool Co. v. Spring Co., 93 Mo. App. 540, 67 S. W. 967; Strohmaier v. Zeppenfeld, 3 Mo. App. 430; Arnot v. Alexander, 44 Mo. 27; St. Louis v. Gas Light Co., 70 Mo. 111; Transportation Co. v. Lansing, 49 N. Y. 499. (2) A lessee has no right to demand the renewal of a lease in the absence of an express contract. Usually the option to select the alternative is with the lessor. 18 Am. and Eng. Enc. of Law, 631; Baman v. Binger, 65 Hun (N. Y.) 39; Smith v. Church, 107 N. Y. 610; 18 Am. and Eng. Enc. Law, 693. (3) At the time of the assignment to plaintiff, there was less than two years of the original leasehold term, and the lease was, therefore, not assignable without the written assent of defendant Connolly. R. S. 1899, sec. 4107; McCartney v. Auer, 50 Mo. 395; Bank v. Clavin, 60 Mo. 559.

E. M. Dearing and *Byrns & Bean* for respondent.

(1) The lease must be construed all together. It was a lease for five years with the option to the lessee or his assigns to renew the lease at its expiration. This covenant to renew was firmly binding and was one of the considerations for which the lessee paid the rent agreed upon. The covenant to renew a lease meant a renewal upon the same terms as the original lease. 18 Am. and Eng. Enc. of Law (New Ed.), 687, sec. D; 18 Am. and Eng. Enc. of Law (New Ed.), 695, sec. C; Lewis v. Stephenson, 78 Law Term Rep. 165. (2) It

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is a universally recognized rule, that a court of equity will compel specific performance by the lessor of his covenant or agreement to renew the lease, and where the right of the lessee to a renewal cannot be set up in a court of law in defense of an action for possession by the lessor, the court will restrain the lessor from continuing the proceeding for possession, pending the action for specific performance. Blackmore v. Boardman, 28 Mo. 420; Arnot v. Alexander, 44 Mo. 25; Strohmaier v. Zeppenfeld, 3 Mo. App. 420; Ridgley v. Stillwell, 28 Mo. 400; Clemens v. Knox, 31 Mo. App. 190; 18 Am. and Eng. Enc. of Law (New Ed.), 695; Finney v. Cist, 34 Mo. 303; Greenwald v. Schaales, 17 Mo. App. 324. (3) The fact that the lease has been assigned does not affect the right to specific performance neither does the fact that Joseph Connolly is dead render any less the liability of his devisee, Francis X. Connolly, upon the lease. Defendants herein recognized the assignment of the lease to the plaintiff. "Equity binds privies as well as parties. Equity binds executors, heirs, personal representatives, assignees and all privies and parties in interest as well as the original principals." 22 Am. and Eng. Enc. Law (Old Ed.), 934, sec. 3, and case cited therein. (4) An unilateral contract for the purchase of land signed only by the party to be charged therewith is enforcible in equity. Smith v. Wilson, 160 Mo. 657, 61 S. W. 597; Ins. Co. v. Bank, 5 Mo. App. 336, 71 Mo. 58. (5) The lease in question was assignable. Donovan v. Brewing Co., 92 Mo. App. 341. The covenant to renew the lease runs with the land. Defendant cannot question the assignment. Tool Co. v. Spring Co., 93 Mo. App. 530, 67 S. W. 967; McClintock v. Joyner, 77 Miss. 680.

GOODE, J.—The petition in this case is in the nature of a bill in equity to compel the defendants to specifically perform a covenant of renewal contained in a lease and to enjoin them from prosecuting an un-

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lawful detainer suit before a justice of the peace for the possession of the premises. Said premises consist of a lot in the town of Potosi, Washington county, on which stand a storehouse and other structures occupied by plaintiff in his business of merchandizing. The lease was executed December 31, 1898, and created a term to run five years from January 1, 1899, at a rent of $30 a month. The lessor was Joseph Connolly and the lessees, William Bennett and Alexander Harrison, then merchants under the firm name of Bennett & Harrison. The contract of lease was in writing and contained a clause that if the rent reserved was not paid when due, the lease should be void and the lessor might, without notice or demand, enter and take possession of the premises. The clause in regard to renewal is as follows: "And the said Joseph Connolly hereby agrees to give the said Bennett & Harrison the option to renew this lease or to purchase the leased property upon such terms as may be agreed upon by both parties at the expiration of this lease." The lessor, Joseph Connolly, died in 1903, having devised the leased premises to the defendant, Frank X. Connolly, and appointed the other defendant, Joseph C. Connolly, executor of his will. In April, 1903, the lease passed by assignment of the original lessees to the plaintiff Blount from whom rent was accepted by F. X. Connolly, devisee of the lessor, until January 1, 1904. The rent was tendered for that month but refused and demand for possession having been made, the defendant in this suit instituted an unlawful detainer action before a justice of the peace to recover the premises. The plaintiff then began this suit, the purpose of which, as said above, is to compel a renewal of the lease and to restrain the prosecution of the suit before the justice. It should be stated that Blount, as assignee of the term, had notified F. X. Connolly, the owner of the fee, on December 1, 1903, that he demanded a renewal of the lease according to its terms.

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No question is made about the sufficiency of this notice and the only point for decision is as to the right of the plaintiff as assignee, to enforce a renewal of the lease. The contention of the defendants is that the option to renew was personal to the original lessees, Bennett and Harrison, and did not pass to the benefit of their assignees. The habendum clause of the lease ran to Bennett and Harrison "and their assigns," and the covenant of Bennett and Harrison in regard to payment of rent was for themselves, their heirs and assigns. There seems to be no doubt that the covenant for renewal of the lease was annexed both to the reversion and the leasehold and ran with the land; therefore, it is binding on the defendant, F. X. Connolly, as owner of the fee, and enforceable by plaintiff as assignee of the original term. There is nothing in the lease instrument to signify an intention on the part of the original parties to confine the right to a renewal to the first lessees, and the decisions are uniform that, in the absence of such a restriction, the covenant for renewal runs to the assignees. [McClintlock v. Joyner, 77 Miss. 678; Blackmore v. Broadman, 38 Mo. 420; Finney v. Cist, 34 Mo. 304; Garnhard v. Finney, 40 Mo. 449; Arnot v. Alexander, 44 Mo. 25; Insteed v. Stonely, 1 Anderson's Rep. 82; Roe v. Hayley, 12 East. 464, 469; Hyde v. Skinner, 2 P. Wms. 197; Connor v. Withers, 49 S. W. 309 (Ky.); Downing v. Jones, 11 Daly 245; Betts v. June, 51 N. Y. 274; Phelps v. Erhardt, 5 N. Y. Supp. 540; Crook v. Crook, 20 Abbott (N. C.) 249; Kolaski v. Michaels, 120 N. Y. 635; Robertson v. Beard, 140 N. Y. 107; McAdam, Landlord and Tenant, p. 549; 18 Am. and Eng. Ency. Law (2 Ed.), p. 693.] The cases of McClintlock v. Joyner and Kolaski v. Michaels, supra, are identical with the present one in all respects and the other cases cited involve the same principles. They hold that a covenant of renewal runs with the land and passes to an assignee of the term. According to the general tests of whether a

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covenant is personal to the covenantee or real and runs with the land, the covenant in the present lease passed by the assignment of the lease. [Champ Spring Co. v. Roth Tool Co., 93 Mo. App. 530.] The New York decisions all declare that covenants to renew a term are assignable and go with the leasehold. The case of Western Transportation Co. v. Lansing, 49 N. Y. 499, which is cited for the defendant as maintaining that a covenant of renewal in a lease is personal to the parties to the instrument, is not in point. The decision in that case was that the covenant relied on was not for the renewal of the lease at all; but was for a tenancy from year to year after the expiration of the original term and, therefore, terminable at the election of either party by giving the requisite notice.

The plaintiff could not set up his equitable right to an extended term growing out of the assignment to him of the covenant to renew, in defense of the unlawful detainer suit before the justice, and as equity will compel the specific performance of an agreement to renew, this suit was well brought. [Arnot v. Alexander, 44 Mo. 25; Biddle v. McDonough, 15 Mo. App. 532, 539.]

The judgment is affirmed. All concur.

B. C. ATTERBERRY, Appellant, v. WABASH RAILWAY COMPANY, Respondent.

Kansas City Court of Appeals, May 30, and November 28, 1904.

1. **RAILROADS: Killing Stock. Negligence: Switch Limits.** Where stock is killed within switch limits plaintiff must show that the negligent act of the railroad company was responsible therefor and no inference of negligence arises from the fact of the killing.

2. ———: ———: ———: **Evidence.** On an analysis and consideration of the evidence it is held that a train could not be stop-

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ped without imperiling the persons and property thereon in time to avoid a collision with the animals after their entry upon the track.

3. ———: ———: **Separate Counts: Justices' Courts: Election.** In a justice's court plaintiff may unite counts for common-law negligence in operating its train and thereby killing his stock, and one count for the failure to ring the bell and sound the whistle and also one for failure to fence; but where the evidence will not permit a recovery on either count the plaintiff is not prejudiced by an order of the court compelling him to elect on which count he will proceed to trial.

On Rehearing.

4. ———: ———: **Public Crossing: Jury Question.** A railroad is liable for injury inflicted at a public crossing if its servants saw or could have seen the cattle upon approaching in time to safely stop the train and then such question is for the jury.

5. ———: ———: ———: **Ringing Bell.** Plaintiff makes a prima facie case when he shows his animals were killed or injured by a train at a public crossing and that the bell was not rung or the whistle sounded; it then devolves upon the defendant to show that the failure was not the cause of the injury, unless this appears from plaintiff's evidence.

6. ———: ———: **Different Counts: Justices' Courts: Election.** Where common-law negligence failure to ring the bell and failure to fence are stated in separate counts in a statement before a justice for killing stock, it is error on appeal to compel plaintiff to elect on which count he will proceed to trial.

Appeal from Macon Circuit Court.—*Hon. N. M. Shelton*, Judge.

Reversed and remanded.

Joseph Park & Son for appellant.

Buster v. Railway, 18 Mo. App. 578. (1) They (servants of the railroads) are expected to have their eyes open, and in the vicinity of road crossings, situated as these were, it is their duty to look out and see if stock are on or about the same. Spencer v. Railroad, 90 Mo. App. 91. (2) The fact that the cow left the crossing and was killed some distance therefrom will make no difference. Hill v. Railroad, 49 Mo. App. 520; Hill v. Railroad, 121 Mo. 477; Harlan v. Railroad,

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65 Mo. 22; Beall v. Railway, 97 Mo. App. 111; Carr v. Upsdell, 97 Mo. App. 326. (3) Where the trial court sustains a demurrer to plaintiff's evidence, the reviewing court will view the evidence in the most favorable light for the plaintiff and make every reasonable intendment in his behalf to sustain a recovery. Shurmerhorn v. Herold, 81 Mo. App. 461; Cherry v. Railroad, 52 Mo. App. 499. (4) It is only where there is an entire absence of evidence tending to prove the material allegations of the petition, or the evidence is insufficient in law to support a verdict, that an instruction in the nature of a demurrer should be given. Russell v. Bancroft, 1 Mo. 662; Lee v. David, 11 Mo. 114; Boland v. Railroad, 36 Mo. 484; Alexander v. Harrison, 38 Mo. 258; McFarland v. Bellows, 49 Mo. 311; Chase v. Patch, 87 Mo. 450; Hunt v. Railroad, 89 Mo. 607; Lockhart v. Railroad, 89 Mo. App. 100; State ex rel. v. Elliot, 157 Mo. 609; Vermillion v. Parsons, 98 Mo. App. 72; Shoe Co. v. Prickett, 84 Mo. App. 94. (5) Plaintiff also makes a good case for failure to ring the bell and sound the whistle continuously from the eighty-rod post until it reached the crossing, and the court erred in sustaining defendant's motion to strike out, thus depriving plaintiff of his statutory grounds of recovery. Lockhart v. Railway, 89 Mo. App. 100.

Geo. S. Grover for respondent.

(1) The ruling on the motion to compel plaintiff to elect was proper, as it was a clear case of misjoinder, in express violation of the statute. Harris v. Railroad, 51 Mo. App. 125. (2) Under the undisputed facts in this case, the plaintiff was not entitled to recover. Wallace v. Railroad, 74 Mo. 594; Wasson v. McCook, 80 Mo. App. 483; Averill v. Railway, 72 Mo. App. 243; Wasson v. McCook, 70 Mo. App. 393; Castor v. Railway, 65 Mo. App. 359; Judd v. Railway, 23 Mo. App. 56; Milburn v. Railway, 86 Mo. 104.

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SMITH, P. J.—This is a common-law action which was commenced by plaintiff against defendant before a justice of the peace to recover damages for the negligent injury by the latter of three cows, the property of the former.

The evidence tended to prove that the plaintiff's cows were injured within the switch limits of defendant's station at the village of Atlanta. When the defendant's train approached within about four hundred feet of the public crossing at that station the plaintiff's cows, twelve in number, were being driven east on a street leading over the crossing and were strung out for about seventy-five feet; the defendant's engineer sounded the whistle and continued to do so until it collided with the first cow, which had gone upon the crossing and stopped in the center of the track one-hundred feet ahead of the approaching engine. The other two animals went upon the track at from forty to eighty feet ahead of the approaching engine which struck and injured them. The steam was shut off on the engine when the last cow entered upon the track. The train, consisting of an engine, thirty-eight freight cars and a caboose, ran about four hundred feet after striking the last cow before it stopped.

The injury to plaintiff's cows occurring within defendant's switch limits at Atlanta, it devolved on plaintiff, in order to entitle him to a recovery, to show that the actual neligence of defendant was responsible therefor. In a case of this kind the law raises no inference of negligence from the mere fact that the plaintiff's cows were injured on defendant's track.

The defendant's servants in charge of its train discovered the plaintiff's cows approaching the track when it was four hundred feet away from the crossing where the collision occurred. They sounded the stock alarm sharply and continuously and to this it seems the plaintiff's cows paid no heed but proceeded to cross

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the defendant's track. All the defendant's servants could do when they discovered said animals in the vicinity of its track headed towards it was to sound the stock alarm whistle. They had the right to presume that the cows on hearing this and seeing the approaching train would turn back, or at least deflect from their course, and when they discovered that the animals had paid no attention to the signals, but were bent on crossing the track, the train was then so close to them that it was impossible to stop it in time to avert the collision.

It does not appear from any evidence that the distance the cows were in advance of the train when first seen on the track, or about to go upon it, was such that defendant's trainmen could have stopped such train in time to have averted the fatal collision. The train was that of a heavy freight. It was not one that was required to stop at Atlanta. It was not at the time of the collision running at an unlawful rate of speed. There was no evidence which tended to show that defendant's trainmen after discovering plaintiff's cows entering upon the crossing could have stopped the train within the four hundred feet of intervening track. The steam on the engine was shut off before the cows that were struck by it went on the track, and notwithstanding this the train ran to where the last cow was struck and four hundred and fifty feet further on before it could be stopped, so that it would appear from this plain enough that the train could not have been stopped within the four hundred-feet distance between where the cows were discovered and where they were struck. It is almost a matter of common knowledge that a train consisting of a freight engine, caboose and thirty-eight freight cars running at an ordinary speed on a level track can not be stopped within a distance of four hundred feet.

A fair analysis and consideration of all the evidence has not convinced us that after the plaintiff's

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cows were seen about to enter on defendant's track the latter's employees in charge of the train could have, without imperiling the persons and property intrusted to it for transportation, avoided the collision and consequent injury. In the light of the following cases cited in defendant's brief we think the demurrer to the evidence was by the trial court properly sustained. [Wallace v. Railway, 74 Mo. 594; Wasson v. McCook, 80 Mo. App. 483; Averill v. Railway, 72 Mo. App. 243; Wasson v. McCook, 70 Mo. App. 393; Castor v. Railway, 65 Mo. App. 359; Judd v. Railway, 23 Mo. App. 56; Milburn v. Railway, 86 Mo. 104.]

It may be observed that though it does not affirmatively appear from the evidence that either the bell was rung or the whistle sounded, as required by the statute, yet, as it is quite obvious that such failure was not the cause of the collision, the plaintiff was in no way prejudiced by the action of the court in requiring him to elect on which one of the several causes of action alleged in his statement he would proceed to trial. It is not believed that the ruling in Harris v. Railway, 51 Mo. App. 125, has any application to an action of this kind brought before a justice of the peace. Under the statute—section 3851, Revised Statute—in suits before a justice of the peace the plaintiff may unite as many causes of action as he may have, but causes of action founded upon contract shall not be joined with causes founded on trespass to the person or real or personal property. This is the only restriction imposed. No formal pleadings are required in such courts. In the present suit the plaintiff's statement or complaint was in three counts: in one, common-law negligence in operating the train was alleged; in another, the failure to ring the bell or sound the whistle; and in still another, the failure to fence at the place where the plaintiff's cows went upon defendant's track. No reason is seen why, under the statute, these three several causes of action could not have been

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joined in one statement. It is, however, clear that there was no evidence to sustain either one of them, and, therefore, the action of the court in requiring the plaintiff to elect on which one of them he would proceed to trial was not prejudicial to him.

The judgment was, as we think, for the right party, and the only one that could have been given on any one of the counts of the statement. And, therefore, it must be affirmed. All concur.

ON REHEARING.

ELLISON, J.—A rehearing was granted in this case and we are satisfied that under the later rulings of the Supreme and appellate courts of the State the plaintiff is entitled to have his cause submitted for a verdict on the facts as they may be believed to be. The law is that although the injury is inflicted at a public crossing the defendant is liable, either where its servants saw the cattle upon or approaching the crossing in time to have safely stopped the train, or where, in the use of due care and outlook, they *might* have seen them in time. [Hill v. Railroad, 49 Mo. App. 520; approved and adopted by the Supreme Court in 121 Mo. 477; Spencer v. Railroad, 90 Mo. App. 91; Beall v. Railroad, 97 Mo. App. 111.]

The Hill case was certified to the Supreme Court by the St. Louis Court of Appeals on the suggestion of Judge THOMPSON on the ground that it was in conflict with Welch v. Railroad, 20 Mo. App. 477, and Hoffman v. Railroad, 24 Mo. App. 546, decided by this court. Why the latter case was thought to be in conflict we cannot discern. In that case the stock got upon the track through an open gate leading to a farm crossing and, as stated by Judge HALL, "at a point where the defendant was not required to anticipate the presence of live stock."

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Under the statute as it now reads (differing from what it was in Revised Statutes 1879, sec. 806) the plaintiff makes a prima facie case when he shows that his animals were killed or injured by a railway train at a public crossing and that the bell was not rung, or the whistle not sounded, as required by the statute. It then devolves upon defendant in order to exculpate itself to show that the failure to do so was not the cause of the injury; unless, of course, plaintiff's own evidence discloses that fact. [R. S. 1899, sec. 1102; Crumpley v. Railroad, 111 Mo. 152; Lloyd v. Railroad, 128 Mo. 595.] The statute reads that when one has suffered damage by an engine injuring or killing his stock, upon which engine "the bell shall not be rung or the whistle sounded," he may recover such damage of the railway company, unless *such company* shows that the failure to do so was not the cause of the injury; or, as just stated, it so appear in plaintiff's testimony.

We think it was prejudicial to plaintiff to compel him to elect at the opening of the trial on which count he would proceed. He did not intermingle several causes of action in one count.

The judgment is reversed and cause remanded. All concur.

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MARION F. WAGAMAN, Respondent, v. SECURITY MUTUAL LIFE INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, December 19, 1904.

1. **LIFE INSURANCE: Past Due Premiums: Consideration: Estoppel.** Although upon the receipt of past due premiums the assured signed a statement that its acceptance was not a precedent or a waiver, yet where the insured continues to receive such past due premiums through a long course of years, it becomes a course of business between the parties, and the insurer is estopped from taking advantage of the agreement which is so often waived after receiving the benefits thereof, and the question of consideration from the agreement that the acceptance should not be a waiver is immaterial.

2. ———: ———: **Agent's Knowledge.** Though an agent's authority is limited and such limitation is known to the assured, yet the acts of the agent are the acts of the company itself, even though exceeding the limitation, and courts ought not aid insurers in technically avoiding liability after rich harvests of premiums for years.

3. ———: **Policy Stipulation: Agent's Authority.** A stipulation in a policy that the agent only has power to receive premiums does not conclude the inquiry into the extent of his authority, and the test of his authority is what he did in the usual course of the company's business.

Appeal from Carroll Circuit Court.—*Hon. John P. Butler,* Judge.

AFFIRMED.

Lozier & Morris for appellant.

(1) The court erred in the admission of evidence. Speer v. Burlingame, 61 Mo. App. 75; Collins v. Todd, 17 Mo. 537; Tucker v. Frederick, 28 Mo. 574. (2) The demurrer to the evidence at the close of plaintiff's case, as also defendant's instruction of a like nature should have been sustained and given, and in their refusal the court erred. (3) The court improperly declared the

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law for the plaintiff to defendant's prejudice, and wrongfully refused to declare the law as requested by the defendant and by reason whereof the court, sitting as a jury, was misled. Chenoweth v. Express Co., 93 Mo. App. 185; German v. Gilbert, 83 Mo. App. 411; Bridges v. Stephens, 132 Mo. 543; Hill v. Railroad, 82 Mo. App. 188; Mass v. Green, 41 Mo. 389; Lindell v. Rokes, 60 Mo. 249; Marks v. Bank, 8 Mo. 317; Corbyn v. Brokmeyer, 84 Mo. App. 649. (4) We cite the following authorities as supporting our contention in regard to the doctrine of estoppel in this case: Cornwall v. Ganser, 85 Mo. App. 684; Spence v. Renfro, 179 Mo. 422; Reynolds v. Kroff, 144 Mo. 433; State ex rel. v. Branch, 151 Mo. 639; Taylor v. Zepp, 14 Mo. 482; Newman v. Hook, 37 Mo. 307; 1 Herman on Estoppel and Res Adjudicata, secs. 3, 11, 14; 2 Herman on Estoppel and Res Adjudicata, 576, 577, 777, 786, 779, 800, 805, 825, 1028; Bank v. Ragsdale, 171 Mo. 185; Bank v. Frame, 112 Mo. 514; Lowrance v. Barker, 82 Mo. App. 125; Williams v. Kirk, 68 Mo. App. 461; Schmertz v. Ins. Co., 55 U. S. C. C. A. 104. (4) There is no evidence to sustain the finding of the court, and the court erred in overruling defendant's motion for a new trial, and in rendering judgment for the plaintiff.

William G. Busby for respondent.

(1) That R. E. Buchanan was an authorized agent of defendant at Carrollton, Missouri, with power to extend time of premium payments and waive conditions of the policy cannot be disputed. (2) We submit that upon this record, R. E. Buchanan was the "*alter ego* of the company, and what he did was the same as if the company was present acting for itself," and that it was not error to admit evidence of his agreement of April 22, 1903. James v. Life Ass'n, 148 Mo. 11; Laundry Co. v. Ins. Co., 151 Mo. 98; Nickell v. Ins. Co., 144 Mo. 431; Wolf v. Ins. Co., 86 Mo. App. 580; Hamilton

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v. Ins. Co., 94 Mo. 367; DeSoto v. Ins Co., 102 Mo. App. 1; Trust Co. v. Ins. Co., 79 Mo. App. 364; Hamilton v. Ins. Co., 35 Mo. App. 267; Edwards v. Thomas, 66 Mo. 482; Thompson v. Ins. Co., 52 Mo. 471; Bush v. Ins. Co., 85 Mo. App. 158; Ins. Co. v. Owens, 81 Mo. App. 201; Van Cleave v. Cas. and S. Co., 82 Mo. App. 683; Chamberlain v. Assurance Co., 80 Mo. App. 590 (3) The reports will be searched in vain for as strong a case of waiver as the one presented by this record. It is overwhelming and conclusive and there is absolutely no escape from it by defendant. There is both waiver by express agreement and waiver by conduct and course of dealing. (4) The evidence not only made out a prima facie case but a complete and conclusive case of waiver by express agreement and absolutely entitles plaintiff to the recovery. McKee v. Ins. Co., 28 Mo. 383; Suess v. Ins. Co., 64 Mo. App. 1; Suess v. Ins. Co., 86 Mo. App. 10; Slater v. Lodge, 76 Mo. App. 387; Dickey v. Life Ass'n, 82 Mo. App. 372; Bishop v. Ins. Co., 85 Mo. App. 302; Ins. Co. v. Eggleston, 96 U. S. 572; L. & A. Co. v. Unsell, 144 U. S. 439; Bacon on Ben. Societies and Life Ins., p. 869. (5) The applications for reinstatement were entirely without consideration, were wholly ineffectual and not binding agreements upon plaintiff, and do not estop plaintiff from claiming waiver by custom and course of dealing. Goodson v. Ass'n, 91 Mo. App. 350; Vining v. Ins. Co., 89 Mo. App. 323; Realty Co. v. Assur. Co., 86 Mo. App. 598; 6 Am. and Eng. Ency. of Law (2 Ed.), 690.

BROADDUS, J.—This suit is to recover premiums paid by plaintiff to defendant for the alleged wrongful cancellation by the latter of his life insurance policy for $1,000, dated January 24, 1891. The policy fee and a premium were paid in advance and by the terms of the policy the sum of $4.35 was to be paid in advance on the 24th day of April, July and October of each year during the life of the policy.

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The written application of plaintiff to defendant, upon which said policy was issued, contained this provision: "Should the applicant fail to pay any dues or premiums on or before the day on which the same shall fall due, or fail to comply with any of the terms of this agreement, or with any of the conditions and agreements contained in the policy (should one be issued) . . . that then, in either event this agreement shall become null and void and all moneys which shall have been paid, shall be forfeited to the said association, for its sole use and benefit." Said policy also provided that "any moneys required to be paid under this policy must be actually paid when due to the association at its home office in Binghamton, New York, otherwise this policy shall be null and void, and all moneys paid hereon shall be forfeited to the said association." Said policy further provided "that all payments on this policy are due at the home office in Binghamton, New York, but at the option of the association, suitable persons may be authorized to receive such payments at other places, but only on the production of the association's receipt therefor, and signed by the secretary or general manager and countersigned by the person to whom the payment is made." The defendant appointed R. E. Buchanan as its agent to receive premiums at Carrollton, Missouri, where plaintiff resided.

Plaintiff failed to pay the premium at the time it fell due on April 24, 1903, but he promised to pay it within thirty days thereafter to Buchanan, who agreed to receive it. He paid it within the time so agreed upon to Buchanan, but defendant refused to accept it. It was shown that Buchanan was not only agent to receive premiums on policies and to countersign and receipt for the same, but that he also acted as solicitor of the defendant for insurance. The notice sent to plaintiff informing him when his premiums would become due contained the following language: "Unless said premium shall be paid on or before said date, the policy

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and payments made thereon will become forfeited and void." Plaintiff paid forty-nine premiums, and a policy fee of five dollars, amounting in the aggregate to $218.35, of which number eleven were paid and received after they were due. After each payment of past due premiums, plaintiff was required to and made a written statement that on account of his failure to pay the premium when due the policy became and was null and void, and further as follows: "I also agree that the acceptance of the above premium after the same became due shall not establish a precedent for the acceptance of future payments to said company after they have become due, nor waive or alter or change any of the conditions in the policy or original application."

Plaintiff introduced evidence to the effect that he had an agreement with Buchanan, the agent, that all premiums that he did not pay before or when due he might pay within thirty days thereafter. Nine of the payments made by him after due were to Buchanan. There is ample evidence in the record to show that defendant had knowledge that Buchanan was receiving past due premiums, and that it was the invariable custom of defendant to receive such premiums from plaintiff.

The cause was tried by the court which found for plaintiff, and defendant appealed.

Defendant insists that under the evidence plaintiff was not entitled to recover. Its position as stated is that "the agreement on the part of the plaintiff that the acceptance of a past due premium should not establish a precedent nor waive or alter any of the other conditions of the policy, was founded upon a valuable consideration, and is binding upon plaintiff, and precludes and estops him from now attempting to shun its burdens and repudiate its terms after he has received its benefits and defendant has acted to its injury and detriment on the faith of the agreement." In support of this theory defendant cites numerous cases to show that

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the agreement was supported by a sufficient consideration, viz.: Chenoweth v. Express Co., 93 Mo. App. 185; German v. Gilbert, 83 Mo. App. 411; Bridges v. Stephens, 132 Mo. 543; Hill v. Railroad, 82 Mo. App. 188; and Lindell v. Rokes, 60 Mo. 249. But it seems to us that it is not a question whether there was a sufficient consideration to support the agreement that the receipt of past due premiums should not afford a precedent for the future. Under the terms of the policy defendant had a right to refuse to accept such past due premiums and to insist upon a forfeiture. The effect of the recital, that the receipt of past due premiums should not make a precedent for the future, in no wise affected the contract of insurance. However, the practice continued and such past due premiums were received through a long course of years until it became a course of business. We do not see how it can avail defendant to urge such recitals when by its course of dealing to the contrary plaintiff was led to believe that a forfeiture would not be insisted on. It is now estopped from taking advantage of an agreement which it so often waived after having reaped the benefits of such a course. The defendant's invariable course of dealing with plaintiff and with other policy-holders was a waiver of the condition of forfeiture for nonpayment of premiums when due. [Andrus v. Insurance Ass'n, 168 Mo. 163; James v. Mut. Assn., 148 Mo. 1; Suess v. Ins. Co., 86 Mo. App. 10.]

Defendant's denial of knowledge of the acts of its agent is not a good defense. It has been said that "it is now held that though the authority of the agent is limited and knowledge of the limitation is brought home to the assured, yet the acts of the agent are considered those of the company itself and they may bind the company though exceeding the limitation." [Bush v. Ins. Co., 85 Mo. App. 158.] This case is much stronger for, as has been said, the evidence here disclosed the fact that defendant had knowledge that its

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agent was receiving premiums past due, which constituted a waiver. And it has also been held: "The courts ought not to be asked to indulge presumption of want of authority in such local agent, to aid the insurers in technically avoiding liability after a rich harvest of years of premiums have been garnered and enjoyed." [Nickell v. Ins. Co., 144 Mo. 432.]

The recitation in the policy that the local agent would have authority only to receive premiums did not conclude inquiry of the extent of his authority. He had, as stated, not only authority to receive premiums, but also to solicit insurance. And in the course of his business he agreed with policy-holders to receive premiums after they were due. The test as to the extent of his authority is, what he did in the usual course of the company's business. Measured by this rule, it is clear that he was clothed with power to receive premiums past due, and thus waive the forfeiture for delayed payments. In James v. Life Assn., 148 Mo. 1, where the agent had authority to collect and receipt for payments of premiums, it was held that defendant might waive a forfeiture for non-payment when due, notwithstanding the condition of the policy that no such waiver should be valid unless reduced to writing and signed by the president or vice-president and one other officer of the association.

All plaintiff's declarations of law are in harmony with this opinion, and those asked by defendant and refused by the court contain a different theory, therefore, they were properly refused.

For the reasons given the cause is affirmed. All concur.

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JOHN DOUGHERTY, Respondent, v. CITY OF EXCELSIOR SPRINGS, Appellant.

Kansas City Court of Appeals, December 19, 1904.

1. **MUNICIPAL CORPORATIONS: Statutory Construction: Employment of Counsel.** Under section 5907, Revised Statutes, 1899, the mayor and board of aldermen may, when necessary, employ additional counsel and pay a reasonable compensation for his services, and the mayor by himself may not make such employment.

2. ———: **Employment of Counsel: Ratification.** An acceptance or adoption of an act performed by another as agent in particular confirmation of what has been done without original authority constitutes ratification, and a municipal corporation may ratify the unauthorized acts of its officers which are within the scope of the corporate powers.

3. ———: **Fourth Class Cities: Board of Aldermen: Ratification.** At a meeting of the board of aldermen of a city of the fourth class with three members present, two voted affirmatively; one negatively on the allowance of the account of an attorney employed by the mayor alone. *Held*, per Smith, P. J., the allowance was invalid and did not constitute a ratification of the act of the mayor, since a majority of the council did not vote in the affirmative; per Ellison, J., Broaddus, J., concurring, the three present constitutes a quorum and the two voting affirmatively constituted a majority of the quorum and the allowance was valid and ratified the act of the mayor.

Appeal from Clay Circuit Court.—*Hon. J. W. Alexander,* Judge.

AFFIRMED.

Harris L. Moore for appellant.

(1) In the present state of the decisions in this State there can be no question that unless the issuance of the warrant to plaintiff is a ratification of his claim by the city he has no grounds whatever for recovery.

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Crutchfield v. Warrensburg, 30 Mo. App. 456. (2) The warrant introduced into evidence in this case did not constitute a ratification of plaintiff's claim by the city, because the city was not only without power to give life to a void claim against itself but section 6759, Revised Statutes 1899, in express terms prohibits such action on the part of the city. Cheeney v. Brookfield, 60 Mo. 53. (3) In order to have given the plaintiff a valid claim against the city a contract on an ordinance was necessary, the warrant was issued on a motion voted for by exactly one-half of the members elected to the board of aldermen.

Simrall & Trimble for respondent.

(1) The mayor and board of aldermen of the city were authorized by law to employ counsel and pay reasonable compensation for legal services demanded by the city. R. S. 1899, sec. 5907. (2) The cases cited by appellant are not parallel cases and hence not in point. In the case of Crutchfield v. Warrensburg, 30 Mo. App. 456, there was no employment of the attorney by the city, there being merely an implied contract. In that case also the court held that there was nothing done by the city to indicate a ratification. In the case of Cheeney v. Brookfield, 60 Mo. 53, the court held that the end sought to be accomplished was not within the scope of its powers. (3) The board of aldermen having found that the city was indebted to respondent, it was its duty under the law to issue a warrant for such indebtedness. R. S. 1899, sec. 6147. (4) To affirm this case it is not necessary to recognize the doctrine of implied contracts upon the part of municipal corporations. In this case there was a contract. The agreed statement of facts says so. The board of aldermen recognized the contract as binding and in the absence of any affirmative evidence that it was not binding, their finding must prevail. (5) Respondent should have af-

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firmatively pleaded in its answer that the contract was not in writing if it desired to make that defense. The agreed statement admits the contract. Nor was any objection made to the evidence. Hinkle v. Karr, 148 Mo. 43; Lammers v. McGeehan, 43 Mo. App. 664. (6) The employment of respondent to represent the city in a damage suit against it was expressly authorized by section 5907, Revised Statutes 1899. Section 6759, Revised Statutes 1899, does not apply to such employment.

SMITH, P. J.—The plaintiff, an attorney at law, sued the defendant, a statutory city of the fourth class, to recover the sum of one hundred and fifty dollars for alleged legal services rendered the latter by the former. The trial court gave judgment in favor of plaintiff on the following statement of "facts agreed."

I. The mayor of defendant city employed plaintiff to represent it—the city— as legal counsel in a certain damage suit.

II. That after the plaintiff had performed the services required of him by said employment, he presented to defendant an account therefor for $150, and at a regular meeting of its board of aldermen the said account was by said board allowed and a warrant was ordered to be drawn on the city treasury therefor.

III. The warrant was subsequently drawn in due and regular form, signed by the mayor and attested by the clerk, and presented to the treasurer, but not paid for lack of funds.

IV. The record of the proceedings of the board of aldermen showed that "the account of Dougherty & Fowler, attorneys for the city in the Leabo case for $300 was presented and on motion was allowed by the following vote. Combs, yes; King, yes; Bangs, no." It was agreed that the above entry was the only rec-

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ord either of any warrant, for the issue of any warrant *or for allowing the bill* and *the only one that referred to it.*

V. That the damage suit was for $5,000 and amount recovered $150. That the fee charged by plaintiff was reasonable.

The statutes, section 5907, Revised Statutes, provides that in case a city attorney has been appointed *the mayor and board of aldermen* may, if they deem it necessary, employ additional counsel and pay them a reasonable compensation for any legal services demanded by the city. We may perhaps presume that at the time of the plaintiff's alleged employment by the mayor that a city attorney had been duly appointed and was performing the duties of that office. It has been seen from the facts agreed that the plaintiff's employment as additional counsel for defendant was made by the *mayor only* and *not by the mayor and board of aldermen,* as required by the statute just referred to.

The law is well settled that when special powers are conferred, or where a special method is prescribed for the exercise and execution of a power, this brings the exercise of such power within the provision of the maxim *expressio unius,* etc., and by necessary implication forbids and renders nugatory the doing of the thing specified *except in the particular way pointed out.* [Kolkmeyer v. Jefferson City, 75 Mo. App. l. c. 683; McKissick v. Mt. Pleasant Twp., 48 Mo. App. 416; Heidelberg v. St. Francois Co., 100 Mo. 74.] The mayor can make no valid appointment or employment of any of the officers or persons referred to in section 5907, supra, *without the consent and approval of a majority of the members elected to the board of aldermen.* It is, therefore, obvious that the employment of the plaintiff by the mayor was invalid for the want of the concurrence of the majority of the board of aldermen. The consent and approval by the latter was es-

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sential to give it validity. [Eichenlaub v. St. Joseph, 113 Mo. 395.]

But it may be contended that even though the employment by the mayor without the consent and approval of the board of aldermen was invalid, yet since the latter was in the first instance authorized to give its consent and approval thereto, it could ratify the action of the mayor and thus validate the plaintiff's employment. A ratification may be defined to be "an acceptance or adoption of an act performed by another as agent or representative in particular confirmation of what has been done without original authority." A municipal corporation may ratify the unauthorized acts and contracts of its officers which are within the scope of the corporate powers. The principle as to ratification is the same with corporations as with individuals. [Dillon on Corp., sec. 463.]

The insuperable difficulty to be met in the endeavor to uphold the theory of ratification is that while the statement of facts agreed shows that the board of aldermen allowed the plaintiff's account for the services performed by him under his contract of employment by the mayor, and that a warrant for the amount thereof was ordered to be drawn on the defendant's treasury and was signed by the mayor and attested by the secretary, the undisputed record kept by the board of aldermen of its proceedings shows that of the four members of the board of aldermen only three were present at the meeting when the plaintiff's account was passed upon by that body and that only two voted for the allowance. If all three of the four who were present had voted for it there would, I think, be some sufficient ground for claiming a subsequent ratification of the employment. The board is, under the statute, required to consist of four members, three of whom were required to constitute a majority; and, therefore, in order to make valid an appointment or employment by the mayor under said section 5907 the consent and ap-

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proval of three members of the board was required. And the sole act of the mayor in entering into a contract of employment with plaintiff could not in principle be ratified by a less number than a majority of the board; which, as has been seen, the plaintiff's employment did not have in this case.

It is true that in a paragraph of the statement of facts agreed it is recited that at a regular meeting of the board the plaintiff's account was presented and was "considered to be just and proper and a warrant ordered to be drawn on the city treasurer for the amount of said account;" but this is contradicted and rendered nugatory by the recital in a subsequent paragraph to the effect that the only record of said board in relation to the allowance of said account or the issues of a warrant therefor shows, as already stated, that there was present when the said board met and allowed said account and ordered a warrant to issue therefor, *only three members* and that *only two of these voted* in favor of said allowance and the issue of the warrant therefor. Since, in the statement of agreed facts, such a repugnancy exists, I think the facts as disclosed by the record of the board ought to control us in determining whether or not that body allowed plaintiff's account and ordered a warrant to be drawn therefor; and if so, then there was no such allowance and no ground upon which to base the claim of ratification.

If the plaintiff's employment by the mayor alone can be upheld, then that officer may fill each of the offices mentioned in said section 5907; or he may enter into any contract within the corporate authority of the city without the concurrence and in spite of the board of aldermen. The exercise of such powers by the mayor alone we think inefficacious to bind the defendant, because impliedly forbidden by the statute.

While the plaintiff seems to have rendered very meritorious services in behalf of the defendant, I have been unable to discover anything in the agreed facts to

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warrant the conclusion that the plaintiff is entitled to recover of defendant for the value thereof; I cannot concur with the majority in the opinion expressed by them.

ELLISON, J.—I believe the judgment of the trial court should be affirmed. The statute applicable (section 5907, Revised Statutes 1899) reads: "In case a city attorney has been appointed, the mayor and board of aldermen may, if they deem it necessary, employ additional counsel and pay them reasonable compensation for any legal services demanded by the city." As stated by Judge SMITH, the board of aldermen consisted of four members and three of these were present at the meeting which allowed plaintiff's account, two of them voting "yes" and one voting "no." The three being a majority of the whole body constituted a quorum, and the two voting "yes," being a majority of that quorum, made a valid action of the board of aldermen. [1 Dillon on Munic. Corp., secs. 278-282.] It is not necessary that a majority of the whole body favor a measure, unless the law governing such body so declares. On the contrary, it is only necessary that a majority of those present (if they constitute a quorum) should favor the measure.

Affirmed. *Broaddus, J.*, concurs.

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ROLLA BRAY, Respondent, v. JOHN W. RIGGS, Appellant.

Kansas City Court of Appeals, February 6, 1905.

1. **TRIAL AND APPELLATE PRACTICE: Conflicting Evidence: Proper Instructions.** Where the evidence is conflicting and the instructions so clearly and fairly present the theory of each party that the jury cannot misunderstand the issues, the appellate court cannot interfere.

2. **———: Evidence.** Certain objections to the admission of evidence are reviewed and where the record permits the appellate court to consider the same the action of the trial court is approved.

3. **REAL ESTATE BROKER: Commission: Assignment: Splitting Demand.** Plaintiff, a real estate broker, told another broker of his contract with a landowner and promised such broker one-half of the commission if he would secure a proper purchaser, which he did. *Held*, this was not an assignment of a part of the plaintiff's cause of action so as to split the demand.

Appeal from DeKalb Circuit Court.—*Hon. A. D. Burnes*, Judge.

AFFIRMED.

Kendall B. Randolph for appellant.

(1) The court erred in overruling defendant's objections to the testimony of the plaintiff as to conversations between himself and William Dice. Also in permitting plaintiff's witness Dice to testify to conversations with plaintiff. O'Neil v. Crain, 67 Mo. 250; Hall v. Jennings, 87 Mo. App. 634. One objection to that class of testimony was sufficient. Schierbaum v. Schemme, 157 Mo. 1; Krueger v. Railroad, 94 Mo. App. 458. (2) The court erred in giving plaintiff's instructions. Cameron v. Hart, 57 Mo. App. 142; Evers &

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Hunt v. Shumaker, 57 Mo. App. 454; Mack v. Schneider, 57 Mo. App. 434; Voegeli v. Granite Co., 49 Mo. App. 650; Carder v. Primm, 60 Mo. App. 423; Feary v. Railroad, 162 Mo. 105; Erwin v. Railroad, 94 Mo. App. 297. (3) All of plaintiff's instructions are in conflict with defendant's instruction numbered four. In Modisett v. McPike, 74 Mo. 648, the court says: "Each instruction must be correct in itself. All must be consistent with each other, and the whole taken together must present but one doctrine." Thomas v. Babb, 45 Mo. 384; Henschen v. O'Bannon, 56 Mo. 289; Stone v. Hunt, 94 Mo. 475. (4) The verdict is against the law. There is no right of recovery in the plaintiff under the law. He had assigned to Dice verbally a one-half interest in his contract with defendant. Plaintiff was therefore neither the real party in interest, nor was he the trustee of an express trust. R. S. 1899, secs. 540, 541.

Hewitt & Blair for respondent.

(1) The first error assigned by the appellant is a misrepresentation of the trial court and the record. (2) There was ample testimony upon which to base plaintiff's instructions. (3) Instructions were proper. Childs v. Crithfield, 66 Mo. App. 426; Henderson & James v. Mace, 64 Mo. App. 393. The rule as announced is too well settled in this State. Lemon v. Lloyd, 46 Mo. App. 452; Gelatt v. Ridge, 117 Mo. 553; Crone v. Trust Co., 85 Mo. App. 607; Taylor v. Parr, 52 Mo. 251; Wetzell v. Wagoner, 41 Mo. App. 509. (4) There is no conflict between plaintiff's and defendant's instructions. The theory upon which the case was tried by both parties and every phase of the evidence was put fairly and squarely before the jury by both sets of instructions, and the jury, being the judges of the evidence, the weight of the evidence, and the credibility of the witnesses, found for plaintiff and

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the court should not disturb the finding. The verdict is for the right party. Garche v. Deane, 40 Mo. 168; Jones v. Poundstone, 102 Mo. 240; Norton v. Paxton, 110 Mo. 456.

ELLISON, J.—Plaintiff instituted this action to recover of defendant five hundred dollars alleged to be due as commission for the sale of defendant's farm. Plaintiff prevailed in the trial court.

The evidence in behalf of plaintiff in support of the verdict tended to show that defendant was the owner of a farm of 170 acres in DeKalb county and that he agreed with plaintiff to pay him as a commission all over the sum of $50 per acre for which the farm might be sold. That afterwards plaintiff, through one Dice, procured a purchaser named Cornelius who bought the farm for a sum amounting to $500 more than $50 per acre. There was no dispute that defendant received from Cornelius the price stated. But there was evidence in his behalf which tended to contradict the evidence for plaintiff in essential particulars. That controversy of fact was determined by the jury and we must find some reason in the conduct of the trial for a reversal, else the judgment should be affirmed.

All of the instructions asked by defendant were given and we have no complaint on that score. Those for plaintiff are each objected to, but an examination of them fails to disclose any fair ground of criticism. The instructions entirely present the case from the standpoint of each party so fully, clearly and fairly that the jury could not have misunderstood the issues of fact upon which a verdict was to be rendered. [Gelatt v. Ridge, 117 Mo. 553; Tyler v. Parr, 52 Mo. 249; Lemon v. Lloyd, 46 Mo. App. 452; Crone v. Trust Co., 85 Mo. App. 601.]

There are many objections to the admission and exclusion of testimony and they, too, we believe to be

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not well taken. We are referred to pages of the abstract in support of some of these criticisms of the action of the court and find that no objection or exception was taken. In other instances objections were made by defendant and sustained. However, in other instances objections were duly made and being overruled, exception was taken, but in these we do not regard that any error of substantial moment was committed. Some of these will be embraced in what we shall say in reference to another branch of the case.

There are twenty-two separate and distinct points of objection assigned by defendant as grounds for reversal of the judgment; and some of these are variously subdivided. It is not practical within the limits of an opinion to set out in detail our reasons for believing them to be not well taken. As a cause for such extended objection it is suggested that the verdict is so much against the weight of the evidence that objections, which otherwise might be considered technical, made to matters which otherwise might be considered harmless, became necessary and important. An examination of the evidence has not impressed us that this is true. The evidence tended strongly to show the contract with plaintiff as already stated. That plaintiff told Dice of his contract with defendant and engaged him to assist him in procuring a purchaser for the land, agreeing to give Dice one-half the commission if the latter succeeded. The jury have found that Dice was the procuring cause of the sale which defendant made to Cornelius. The jury had abundant ground to so find. They might have found the other way and have been supported by evidence, yet finding as they have, we are not authorized to interfere.

2. But among defendant's objections is one that plaintiff by his agreement with Dice, assigned a part of his account or contract with defendant without the latter's consent; and that he, therefore, should not re-

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cover. We have already said that plaintiff stated to Dice his contract with defendant and agreed that if he, Dice, would find a proper purchaser that he, plaintiff, would divide with him the commission defendant had agreed to pay. This was not an assignment of a part of a cause of action. It is an agreement commonly made among real estate agents and it in nowise affected plaintiff's claim to the whole commission.

Upon the whole record we are satisfied that no error was committed by the trial court which in anywise affected the merits of the action (Berkson v. Railroad, 144 Mo. 211), and the judgment is accordingly affirmed. All concur.

GEORGE LACKLAND, Respondent, v. THE LEXINGTON COAL MINING COMPANY, Appellant.

Kansas City Court of Appeals, February 6, 1905.

1. **MASTER AND SERVANT: Negligence: Conflicting Evidence: Appellate Practice.** Where the evidence is conflicting and the finding is for the plaintiff the appellate court in passing upon the verdict will not consider the sufficiency of the plaintiff's testimony.

2. ———: **Instruction: Prudent Man.** The contention that an instruction was vicious in using the term "prudent" man without qualifying it with "reasonably" is held not well taken, since the objection is nullified by other parts of the same instruction.

3. ———: **Assumption of Risk: Instruction.** An instruction constituting a general statement of the law in regard to the assumption of risk is held to have been harmless.

4. ———: **Damages: Future Pain.** An instruction permitting the jury to take into consideration the physical and mental pain and suffering which plaintiff "will suffer" in the future is held not to permit the jury to indulge in mere conjectures and possibilities in fixing the damages.

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5. **EVIDENCE: Physician: Privileged Communication.** What the attending physician may have discovered as to plaintiff's condition at the time he examined him for the injury in litigation is privileged.

6. **TRIAL AND APPELLATE PRACTICE: New Trial: Newly-Discovered Evidence: Discretion.** In the matter of new trial on the ground of newly-discovered evidence much is left to the discretion of the trial court; and the appellate court must find an abuse of the sound discretion before interfering.

Appeal from Lafayette Circuit Court.—*Hon. Samuel Davis,* Judge.

AFFIRMED.

William H. Chiles and *W. S. Shirk* for appellant.

(1) The demurrer to the evidence at the close of respondent's case ought to have been sustained. This case is almost identical with that of Watson v. Coal Co., 52 Mo. App. 366. This doctrine is repeated and confirmed also by this court in Marshall v. Hay Press Co., 69 Mo. App. 256. And these cases are in harmony with the decisions of the Supreme Court: Keegan v. Kavanaugh, 62 Mo. 232; Hulett v. Railroad, 67 Mo. 239; Aldridge's Admr. v. Furnace Co., 78 Mo. 559. (2) The evidence offered by the appellant not adding anything to the case made by respondent but rather weakening it by showing that whatever had taken place was the result of unavoidable accident, the appellant again demurred to the evidence at the close of all the evidence, which should have been sustained upon the authorities cited under point I. See also as to pure accident: Guffey v. Railroad, 53 Mo. App. 469; Harvey v. Railroad, 6 Mo. App. 585; Henry v. Railroad, 113 Mo. 525. (3) Instruction numbered one given on behalf of the respondent is erroneous in more respects than one. The last clause defining the duty of the employee obeying orders uses the words, "unless the danger was so glaring that no prudent man would have undertaken

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the same." The appellant was entitled to have and the jury should have had the degree of prudence defined or limited, or at least qualified by the words used in such instructions, such as "ordinarily prudent man" or "reasonably prudent man," or "in the exercise of ordinary prudence" or "in the exercise of common prudence." Bradley v. Railroad, 138 Mo. 293; Weldon v. Railroad, 93 Mo. App. 668; Huhn v. Railroad, 92 Mo. 447; Blanton v. Dodd, 109 Mo. 75; Wendler v. Fur. Co., 165 Mo. 527. (4) Instruction numbered three given by the court for the respondent is erroneous and should not have been given. It is merely an abstract proposition and belongs to the class of such abstract propositions as are dangerous and vicious, likely to mislead a jury. It should have been refused. Thompson v. Railroad, 93 Mo. App. 548; Hoepper v. Hotel Co., 142 Mo. 378. (5) Instruction numbered five given on behalf of respondent is erroneous in allowing the jury to consider the pain he will suffer in the future. This is directly decided in Bradley v. Railroad, 138 Mo. 311. (6) The court has in the cases of James v. Kansas City, 85 Mo. App. 20, and Smart v. Kansas City, 91 Mo. App. 586, laid the law down pretty broadly in refusing to allow a physician to testify to anything he may have ascertained in the examination of a patient, but in such cases as this one, where the physician fails utterly to find the injury (hernia) complained of mostly, he ought to be permitted to state such fact, and that the respondent made no complaint of any, neither of which is "information necessary to enable him to prescribe for such patient," in the interest of truth and justice and to prevent fraud and deception, and the statute should not be construed further than its very terms and language. (7) The court erred in not allowing a new trial on the ground of the newly-discovered evidence of Pearl R. Smith as shown by the affidavit.

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Charles Lyons and *Alexander Graves* for respondent.

(1) Appellant's first point is that on account of respondent's alleged knowledge of the danger he assumed the risk and that, therefore, appellant's demurrer to the evidence should have been sustained, citing Watson v. Coal Co., 42 Mo. App. 366. But the facts of that case are totally different from the facts of this case. But Lackland was prevented from sounding this rock and relied upon the assurance of the foreman who was his superior. (2) Appellant criticises instruction numbered one given for respondent which concludes as follows: "and if you further find from the evidence that the plaintiff in the exercise of ordinary care and prudence obeyed said order to perform his said work of spragging at that time and place, then the plaintiff had the right to obey said order, relying upon the superior judgment of said boss as to the safety of obeying said order and doing said spragging at that time and place, unless the danger was so glaring that no prudent man would have undertaken the same." "Ordinary care and prudence" are defined by respondent's instruction numbered four. That is to say, instruction numbered one is criticised because it was not tautological. Besides, we have the sanction of this court in the premises in Nash v. Dowling, 93 Mo. App. 163; Hartman v. Muehleback, 65 Mo. App. 578. (3) The matters set forth in point V completely and fully answer what appellant urges in the sixth point of its brief. (4) Plaintiff's instruction numbered five is correct and is a counterpart of instruction numbered three which was approved by the Supreme Court in Smiley v. Railroad, 160 Mo. 634. Also instruction numbered three which was approved by Court of Appeals in Harmon v. Transit Co., 102 Mo. App. 222. (5) Appellant's eighth point is that the court refused to admit certain parts of the evidence of Dr. Tucker,

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the company's physician, who went to see plaintiff at the time he was hurt. This is precisely the same point as was made and ruled adversely in Hawthorn v. Railroad, 94 Mo. App. 225; Streeter v. Breckenridge, 23 Mo. App. 244; Corbet v. Railroad, 26 Mo. App. 621; Gartside v. Ins. Co., 76 Mo. 446; Smart v. Kansas City, 91 Mo. App. 595. (6) The last point appellant makes is that the court should have granted a new trial because of newly-discovered evidence as contained in the affidavit of Smith to the effect that respondent had told him he was previously ruptured. This evidence was in contradiction of the plaintiff and of plaintiff's witnesses, Mrs. Gardine, John Henneberg and Andrew Lackland, all of whom testified that he had not been previously ruptured and gave the grounds of their knowledge. Tootle & Co. v. Lysaght & Co., 65 Mo. App. 144.

ELLISON, J.—The plaintiff is a coal miner and at the time of the injury of which he complains was in defendant's employ under the immediate direction of one of its foremen. Plaintiff complains that while at work defendant was negligent in caring for and guarding the roof of the mine and that he was hurt by a rock coming loose from the roof and falling upon him. The result in the trial court was in plaintiff's favor.

It appears that defendant was mining coal with the aid of an electric machine and that plaintiff was an employee called a "spraggler" and his work was called "spraggling." This work consisted of keeping the chain of the machine free from obstruction and of propping up coal that would be loosened by the machine. While engaged in this work a rock from the roof fell upon him as just stated. It was conceded by plaintiff in the testimony which he gave in his own behalf that, ordinarily, it was his duty (and that of the other employees) to keep a lookout for his safety and that, to that end, he should inspect the condition of the mine's

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roof by tapping or sounding; but that in the instance which forms the subject of the present controversy one of his fellow-workmen a short time before the rock fell was examining it with a view of ascertaining its condition of being safe or unsafe, when the foreman in charge informed him that he (the foreman) had just inspected the rock and that it was safe and for him (the workman) to proceed with his labor. Plaintiff heard and saw what has been stated and testified that he relied upon the assurance of the foreman and continued his work also. The plaintiff was supported by other witnesses, and though there may have been contradictory evidence from other sources and inferences drawn in defendant's behalf from the detail of yet other evidence, yet, since the result was for plaintiff, we must look to the testimony in his behalf in passing upon the verdict found; and we find it to be ample. We do not regard the case of Watson v. Coal Co., 52 Mo. App. 370, as applicable to the facts of this case. It may be better likened to that of Carter v. Baldwin, 81 S. W. 204.

The defendant has made several objections to instructions, but we think the criticisms not of sufficient substances to justify a reversal. The last clause of the first instruction for plaintiff in regard to the duty of an employee contains the expression, "unless the danger was so glaring that no *prudent man* would have undertaken the same." It is said that the word "prudent" should have been qualified by the word "reasonably" or "ordinarily." The instruction is lengthy and we will not set it out; but the objection urged is nullified by the use of words in another part of the instruction, wherein the jury was required to believe that the plaintiff exercised "ordinary care and prudence" in doing the work at the time and place charged. Besides, we believe from the connection with which the objectionable word was used, it would be more likely to have influenced the jury to defendant's interests than

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to the plaintiff's. Other objections were made to the instructions which we deem to be untenable.

Objection is made to instruction numbered three concerning plaintiff's assuming risk of employment, but not the risk of defendant's negligence. The instruction may properly be termed a general statement of the law on that subject, but we cannot discover any possible way in which it could have worked any harmful result.

Objection is also made to plaintiff's fifth instruction for authorizing damages for future physical and mental pain. Such pain, mental or physical, is an element of damage in this State where the injury is permanent. [Smiley v. Railway, 160 Mo. 629.] A closing remark of Judge MACFARLANE in Bradley v. Railway, 138 Mo. 293, was perhaps an inadvertence. But it is said that the instruction leaves the jury unguarded and without limit as to such future damages; so much so that the jurors might go to any limit in conjecture. We are cited to a recent opinion by Judge BLAND in Caplin v. St. Louis Transit Co., now pending on motion for rehearing in support of the objection. Judge BLAND cites and approves the case of Schwend v. Transit Co., 105 Mo. App. 534, 80 S. W. 40, in St. Louis Court of Appeals wherein it was held that an instruction authorizing recovery for pain and anguish which the plaintiff "may" suffer in the future is erroneous, on the ground that it allowed mere conjecture and possibilities to be indulged in by the jury in fixing the amount. The instruction in the case at bar does not leave to the jury to say what this plaintiff *may* suffer, for it uses a more restrictive word; the language being that the jury "may take into consideration the physical and mental pain and suffering, if any, that they may believe that he *will* suffer in the future," etc. So worded, the case is clearly distinguishable from those in the St. Louis Court of Appeals, and the instruction is sup-

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ported by Chilton v. St. Joseph, 143 Mo. 192, and Bigelow v. Railway, 48 Mo. App. 367.

We regard the instructions for both parties, as a series, as putting the case to the jury in a plain and satisfactory way, and we do not believe they could have caused any misunderstanding by the jury; nor that they, as a whole, failed to put before the jury everything necessary to a proper consideration of the case.

Dr. Tucker was called to see plaintiff after he was injured. He was asked by defendant's counsel to "state to the jury what he found." The trial court sustained plaintiff's objection to the question. Defendant then offered to prove by the doctor that he "examined Mr. Lackland on January 24, 1903, shortly after the accident occurred; that he found no serious injury; that the outer portion of the left leg midway between the thigh and knee was considerably bruised and that in his opinion the patient would be able to resume work within ten days or two weeks; that he had made no complaint whatever of hernia or anything else than as stated. The offer was properly refused on plaintiff's objection. See opinion of GOODE, J., in Haworth v. Railway, 94 Mo. App. 215, 225, and authorities there cited. Also, opinion of this court in Smart v. Kansas City, 91 Mo. App. 595.

One of the grounds of the motion for new trial was that of newly-discovered evidence, In the matter of new trials much is left to the discretion of the trial court. The opportunity for correct judgment is better with that tribunal. We do not think a showing has been made of an abuse of discretion, or that justice would be subserved by reversing the judgment for that cause.

We will affirm the judgment. All concur.

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GEO. W. DELO et al., Respondents, v. CHAS. F. JOHNSON et ux., Appellants.

Kansas City Court of Appeals, February 6, 1905.

1. **FRAUDULENT CONVEYANCES: Husband and Wife: Payment of Liens: Creditors' Rights.** A wife bought her husband's real estate at an execution sale against him. Subsequently the husband paid off several mortgages on such real estate. *Held*, payment by the husband was fraudulent as to existing creditors whom he was hindering and delaying and such creditors were entitled to subject the land to the payment of their debts, even though the wife had no fraudulent intent in the transaction.

2. ———: ———: ———: ———: **Equity.** As the husband was insolvent the chancery proceeding was the proper mode to reach his interest in such lands.

3. ———: ———: ———: ———: **Decree.** The decree is held sufficient to protect the wife's interest since it makes the money paid by her a first lien and secures her the surplus in the land after the payment of the judgment creditors.

Appeal from Dallas Circuit Court.—*Hon. Argus Cox*, Judge.

AFFIRMED.

J. W. Miller and *O. H. Scott* for appellants.

(1) Before there can be a fraudulent conveyance the following conditions must exist. (a) The thing disposed of must be of value out of which the creditor could have realized all or part of his claim. (b) It must be transferred or disposed of by the debtor. (c) This must be done with intent to defraud. Wait on Fraudulent Conveyances, sec. 15, p. 27; Hart v. Leete, 104 Mo. 315; State v. Bragg, 63 Mo. App. 27. (2) Fraud is never presumed; it must be proven as any other fact. Dallam v. Renshaw, 26 Mo. 533; Bank v.

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Worthington, 145 Mo. 100. (3) Where a transaction is as compatible with honesty as with dishonesty it will be presumed to be honest. Chapman v. McIlwrath, 77 Mo. 38; Robinson v. Dryden, 118 Mo. 535; Gruner v. Scholz, 154 Mo. 415. (4) Debts due from a husband to a wife are on the same footing as debts due any other creditor. Hart v. Leete, 104 Mo. 315; Kennedy v. Powel, 34 Kan. 22. (5) Property purchased at a public sale stands on a different footing from a voluntary conveyance from husband to wife, and it is no badge of fraud that husband and wife continued to occupy the property after purchase by the wife at public sale. Clark v. Cox, 118 Mo. 652; Gruner v. Scholz, 154 Mo. 425. (6) The only fraud alleged in plaintiff's petition is that the sheriff sale to Mrs. Johnson was fraudulent; and if said sale was conducted without fraud as is clearly shown by the evidence and admitted by the court's decree, plaintiffs cannot recover for no subsequent fraudulent transactions, if any there were, were alleged in the petition. Summers v. Ins. Co., 90 Mo. App. 700; Reed v. Bott, 100 Mo. 62; Goodson v. Goodson, 140 Mo. 218; Needles v. Ford, 167 Mo. 512. (7) He who seeks equity must do equity. The Dallas County Bank, through its president, Thomas M. Brown, having, through pressure and threats of foreclosure, compelled Johnson to apply the money derived from the normal school judgment to the payment of the debts secured by mortgage on Mrs. Johnson's land, cannot now repudiate the transaction as fraudulently accomplished. Austin v. Loring, 63 Mo. 19; McClanahan v. West, 100 Mo. 322; Clyburn v. McLaughlin, 106 Mo. l. c. 524.

J. S. Haymes and *J. T. White* for respondents.

(1) If a debtor in embarrassed circumstances, enhances the value of his wife's land by placing improvements thereon or by paying part of the purchase-

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money, or by removing other encumbrances therefrom, his creditors may subject such land to the payment of their debts *pro tanto*. Bracken v. Milner, 99 Mo. App. 193; Kirby v. Bruns, 45 Mo. 234; Garrett v. Wagner, 125 Mo. 450; Hardware Co. v. Horn, 146 Mo. 129; B. & L. Ass'n v. Reed, 31 S. E. [Va.] 514; Reel v. Livingston, 16 So. 284, 43 Am. St. 202; Trefethan v. Lynam, 38 L. R. A. 190, 90 Me. 376; Burt v. Timmons, 6 Am. St. 668; Morris v. Fletcher, 77 Am. St. 93 note; Collins v. Slade, 9 S. W. [Ky.] 245. (2) The intent of the debtor is immaterial. When he makes such voluntary disposition of his property, available for the payment of his existing debts, that his creditors are hindered or delayed in collecting their claims, his acts are fraudulent and void as to them, although he contemplated no wrong. It is the effect of what he does, not the intention with which he does it, that determines its fraudulent character. Patten v. Casey, 57 Mo. 118; White v. McPheeters, 75 Mo. 294; Snyder v. Free, 114 Mo. 371; Hoffman v. Nolte, 127 Mo. 136; Cooper v. Standley, 40 Mo. App. 144; Bucks v. Moore, 36 Mo. App. 535; Grocer Co. v. Walker, 69 Mo. App. 556; Hall v. Goodnight, 138 Mo. 586; Garrett v. Wagner, 125 Mo. 450. (3) The finding of actual fraud by the trial court is supported by these facts.

BROADDUS, J.—The plaintiffs, certain judgment creditors of the defendant, Charles F. Johnson, sue in equity to set aside a certain deed made by a sheriff to the wife of Johnson, and to subject the same to their rights as such creditors. The main facts are as follows. The defendant, Charles F. Johnson, at the time of the different transactions to which reference will be made was the owner of real estate of the value of $20,000 or $25,000, that the various plaintiffs at different times during 1897, 1898, 1899 and 1902, recovered separate judgments against him for their respective indebtedness; and that at and prior to the

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times said judgment were rendered said defendant, Charles, had mortgaged his said real estate for a large amount, as follows, to-wit: One mortgage dated in October, 1894, for $9,400 and a second one dated December 22, 1894, securing two notes, one for $7,700, and one for $3,722, all in the aggregate of $20,892. In October, 1895, a sale was made of all the lands owned by defendant and so mortgaged, said sale being under an execution issued on a judgment rendered against him in favor of the Springfield Foundry & Machine Company for $95.90, at which sale the defendant's wife became the purchaser for the sum of $106, and she received a deed from the sheriff to the lands. At the time of this sale defendant was wholly insolvent. There can be little or no dispute but what the wife paid her own money for the land she so bought at said sheriff's sale. Whatever purpose the husband may have had in view, there is no evidence impeaching the good faith of the transaction so far as his wife was concerned. According to witnesses, the land at that time was not of value exceeding the mortgage indebtedness. In April, 1897, defendant Charles paid off and discharged the first of said mortgages and the same was satisfied of record; and afterwards he paid off and discharged the greater part of the second mortgage, but the record does not show any satisfaction whatever. There was evidence of other transactions connected more or less to the principal one, but for the purpose of the appeal they are not important. The finding was for plaintiffs and defendants appeal.

We differ with the court as to its finding that defendant's wife purchased the land at the sheriff's sale with the intention to delay or defraud defendant's creditors, but as the decree, if justified in other respects, carefully guards all the rights of the wife, it is immaterial.

Defendant's principal contention is that as the plaintiffs only rely upon the allegations in their peti-

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tion that the sale to Mrs. Johnson was fraudulent, they were, therefore, not entitled to recover because they have failed to sustain said allegation by proof. But it seems that there is another allegation in the pleading that would justify the decree, to-wit: The payment by Johnson of the two mortgages on the land amounting to about $20,000—or about its entire value. It cannot be successfully denied that his creditors were entitled to the money so paid to be applied on their judgments. When defendant applied his own money to the extinguishment of these incumbrances on his wife's land he was guilty of hindering and delaying his creditors, which was a fraudulent act. Under such circumstances the creditors may subject such land to the payment of their debts *pro tanto*. [Hardware Co. v. Horn, 146 Mo. 129; Garrett v. Wagner, 125 Mo. 450; Kirby v. Bruns, 45 Mo. 234.]

The husband being insolvent, a chancery proceeding is the proper mode to reach his interest in such land and subject it to the demands of creditors. [Kirby v. Bruns, supra.]

The decree in this case renders the wife complete justice as it not only secures to her as a first lien the money she paid on the execution sale on the judgment mentioned, but also secures to her the surplus after satisfaction of the plaintiffs' judgments. The case seems to be too plain for comment. Affirmed.

All concur.

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KANSAS CITY, Plaintiff, v. NORTH AMERICAN TRUST COMPANY, Respondent, D. D. DENHAM, Appellant; KANSAS CITY ELEVATED RAILWAY CO. et al., Defendants.

Kansas City Court of Appeals, February 27, 1905.

1. **CONDEMNATION: Mortgagees: Marshalling Assets: Interest.** A prior mortgagee is entitled to priority of payment including interest after judgment of condemnation until payment out of the fund awarded as damages as a condemnation proceeding against the mortgaged land.

2. ——: ——: ——: ——: **Kansas City Charter: Appeal.** The provisions of the Kansas City charter suspending the judgment in case of appeal and interest pending the appeal relates only to the landowner and cannot affect the rights of the prior mortgagee to have his interest between thedate of the judgment and its affirmance on appeal.

Appeal from Jackson Circuit Court.—*Hon. E. P. Gates,* Judge.

AFFIRMED.

H. M. Meriwether and *C. E. Denham* for appellant.

(1) The condemnation of mortgaged real estate has the effect of foreclosing such mortgage on the date of the confirmation by the circuit court of the jury's verdict. In re City of Rochester, 136 N. Y. 89; Ins. Co. v. Smith, 35 N. Y. 301. (2) Where mortgaged real estate is taken under condemnation proceedings the lien of such mortgage is divested and transferred to so much only of the award allowed for the land as is required to extinguish the mortgage at the date on which the condemnation verdict is confirmed by the circuit court. Ins. Co. v. Smith, supra. (3) Condemnation of real estate consumes the fee simple title

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and all lesser estates, including mortgages and deeds of trust, and substitutes therefor an equitable lien upon the award to the amount of such interest. Bonner v. Peterson, 44 Ill. 257. (4) The confirmation of condemnation proceedings gives to the mortgage holder a judgment lien against the city on which no interest shall be allowed or collected. Sec. 18, art. 10, Charter of Kansas City 1898. (5) The fact that an appeal was taken from the order of confirmation and prosecuted until a final decision was obtained upon it, in no manner changed the effect of the confirmatory order foreclosing the mortgage. Ins. Co. v. Smith, supra; In re Paseo, 78 Mo. App. 521. (6) If the mortgage holder is entitled to any further interest after the confirmatory order of the circuit court, it is clearly not as against the city or the subsequent mortgagee, but can only be against the maker of the note by reason of there being a deficiency judgment against him personally.

Scarritt, Griffith & Jones for respondent.

(1) The argument and conclusion of appellant Denham is based upon the false premise that the order of court confirming the verdict of the jury in the condemnation case, gave to the North American Trust Company, mortgagee, in lieu of its mortgage, merely a personal judgment against Kansas City. Kansas City satisfies the judgment as far as it is concerned, by payment of the award into court. The claim of the mortgage must be satisfied by an enforcement of its lien against the *rem*. The provision of the city charter, in question, is solely for the benefit and protection of the city. Sec. 18, art. 10, Kansas City Charter. (2) The theory of the framers of the charter was, that pending an appeal, the owner of the property had the possession of and the beneficial enjoyment of the property, and was, therefore, entitled to no interest on the award therefor. The provision was clearly not intended to

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affect the distribution of the fund among the claimants therefor. Thompson v. Railroad, 110 Mo. 163; Railroad v. Baker, 102 Mo. 553; Jones on Mortgages (2 Ed.), sec. 708; Condemnation v. Todd, 112 Ill. 379; Boutelle v. Minneapolis, 59 Minn. 493. As to liens the awards of the jury stand in place of the land. Ross v. Kendall, 81 S. W. 1107. (3) The note and mortgage in question are a solemn contract. By them it is provided that the owner of the note and mortgage shall have interest on the principal sum after maturity until the same is paid, at the rate of eight per cent per annum, and that he shall have security therefor upon the land in question. The only chance the mortgagee has to recover his mortgage debt is out of the property or the fund in question. We submit that to hold that a charter provision, made on June 6, 1895, could nullify or in any way change or affect the contract of the mortgage executed August 1, 1891, would be to permit a law of the city to impair the obligation of an existing contract and in conflict with section 15 of article 2 of the Constitution of this State, and section 10 of article 1 of the Constitution of the United States, which prohibits the passage of laws impairing the obligation of contracts. R. S. 1899, sec. 3707; Plum v. Kansas City, 101 Mo. 525. (4) As between the claimants to the fund in question, the construction of the contract in question, viz.: The mortgage is a matter of general and not of local law. In such matters, if there is a conflict between the general and local law, the latter must give way to the former. State ex rel. v. Police Com., 80 Mo. App. 206; State ex rel. v. Railroad, 117 Mo. 1; Bradley v. St. Louis, 149 Mo. 122. (5) The charter of Kansas City is subject to the Constitution and laws of the State, and if any provision of the charter is not in harmony with the Constitution and laws of the State, the latter must control. Kansas City v. Scarritt, 127 Mo. 642; Bradley v. St. Louis, 149 Mo. 122; Haag v. Ward, — Mo. —.

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ELLISON, J.—Prior to June 19, 1900, certain real estate in Kansas City, Missouri, stood on the records in the name of M. J. Payne, encumbered by two deeds of trust in the following order and priority: The first note and deed of trust executed by said Payne and wife in favor of Jarvis-Conklin Mortgage Trust Company, all interest therein now being held by North American Trust Company, respondent herein. The second note and deed of trust, executed by said Payne and wife, is in favor of E. C. Lee, all interest therein now being owned and held by D. D. Denham, appellant, the original applicant in this matter.

Subsequent to said deeds of trust Kansas City instituted condemnation proceedings in the circuit court of Jackson county condemning said real estate for park purposes, and a verdict divesting all private ownership in said property and allowing the sum of $5,966.50 therefor, was duly rendered by the jury, and confirmed by that court on June 19, 1900. Said condemnation proceeding was then taken on appeal to the Supreme Court and was there affirmed in August, 1903. In March, 1904, the city paid into court the amount of the award allowed for said property. Thereafter and by agreement of the parties and under order of court, the North American Trust Company withdrew from the amount so deposited in court the sum of $2,165.80, being the amount of the principal of its note with eight per cent interest thereon to June 19, 1900, the date of the circuit court's judgment. The balance of said award, less the sum of $577.20, was by said agreement and order of court, paid over to D. D. Denham to be applied on the note owned by him, leaving the latter sum in dispute between the trust company and Denham.

Denham then filed a motion asking to have said sum of $577.20 paid to him to be applied upon his note, there still being a deficiency thereon greater than the said amount. The trust company filed a counter-motion

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asking that said amount be paid to it as interest at eight per cent upon its note from the date of the judgment in the trial court (June 19, 1900) to the time of the making of the orders of court heretofore mentioned. The court upheld the contention of the trust company that it was entitled to interest on its note after the date of the judgment in the trial court and that said interest should be paid out of said award, ordered said sum of $577.20 paid to the trust company, sustaining said counter-motion of said trust company and denied the original motion filed by Denham, from which order the finding of the court Denham takes this appeal.

The view of the trial court was undoubtedly correct. The money paid into court by Kansas City under the condemnation proceedings stood in place of the land taken by the city and the liens of the encumbrances on the land were transferred to the fund thus paid in, in the order of priority that they held on the land itself before it was taken by the city. [1 Jones on Mort., sec. 708; Thompson v. Railroad, 110 Mo. 163; Boutelle v. Minneapolis, 59 Minn. 493; South Park v. Todd, 112 Ill. 379.] The first holder of the deed of trust is entitled to priority of payment of amount due thereon on the day of payment, or tender to him, without regard to the date of the judgment of condemnation in the trial court. The owner of the deed of trust cannot be deprived of his contractual right to have interest out of the land, or the fund representing the land, until his money is paid to him, or the fund has been exhausted.

But it is contended that the following, found in the provision for appeal in condemnation proceedings (section 18, article 10, Charter, Kansas City), prevents the trust company, as holder of the first security, from drawing interest on such security until after the appeal has been decided by the Supreme Court, viz.: "In case of appeal, the judgment shall stand suspended until the appeal is disposed of, and no interest shall be allowed or collected on the judgment or on the assessments until

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such judgment be affirmed or appeal be dismissed." That provision affects the owner of the land. He is not deprived of his property and its use until after his appeal has been decided and, for that reason, ought not to have interest until after that time. The provision was not intended to reach those who might have contracts with such owner whereby they were secured on the land for the payment of interest. It does not follow that because the charter suspends the right of the owner to interest *on* the fund, that a third party's right should be suspended to interest *out* of the fund.

In support of the argument against the view taken by the trial court, we are cited to Matter of City of Rochester, 136 N. Y. 83. That case does not sustain appellant, but, in our view, is to the contrary. For it is there recognized that the lienor has his lien on the fund for whatever he lacks of getting the full payment of his claim from other sources. The court said: "The balance of the land only (remaining after city's condemnation of water right) could be sold and conveyed on the foreclosure (of mortgage); the referee's deed could convey and did convey only that balance; and the right of the mortgagees became merely an equitable lien upon the fund in the hands of the court to the extent of any deficiency which the land sold did not pay." The same may be said of Home Ins. Co. v. Smith, 35 N. Y. (S. C.) 301. We have not been able to find any authority which, before payment of the debt, would justify a court in cutting off the mortgagee's right to interest to be paid out of the land, or the fund representing the land, until such security is exhausted.

The judgment is affirmed. All concur.

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EMMA R. ST. LOUIS, Respondent, v. KANSAS CITY, Appellant.

Kansas City Court of Appeals, February 27, 1905.

1. **MUNICIPAL CORPORATIONS: Defective Sidewalk: Degree of Care: Instruction.** A municipality should keep its sidewalks in a reasonably safe condition and instructions increasing its burden in that regard should not be given; and in this case such instructions were not cured by others given.

2. **DAMAGES: Petition: Evidence: Instructions.** An instruction should in no case go beyond the petition enumerating the elements of damage, nor should it go so far unless the evidence supports the allegations therein.

3. ———: **Evidence: Experts: Instruction.** A defendant may be entitled to an instruction that while the jury is not bound to accept the testimony of experts, yet, it had no right to disregard such testimony merely for the reason that it was given by experts, and such instruction is held improperly refused.

Appeal from Jackson Circuit Court.—*Hon. W. B. Teasdale,* Judge.

REVERSED AND REMANDED.

R. J. Ingraham, City Counselor, and *L. E. Durham* for appellant.

(1) That portion of instruction numbered 1, given for respondent, whereby the jury was told that the city was bound in law to "securely" and "safely" bind the different sections of the sidewalk together, so that it would be safe, was erroneous. It required absolute unqualified safety. The city is only bound to keep its sidewalks reasonably safe. Smith v. Brunswick, 61 Mo. App. 578; Wallis v. Westport, 82 Mo. App. 522; Nixon v. Railroad, 141 Mo. 438; Carvin v. St. Louis, 151 Mo. 334; Baustian v. Young, 152 Mo. 325. (2) It was in

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conflict with other instructions on that point, and no one can tell which the jury followed. Wallis v. Westport, 82 Mo. App. 522; Linn v. Bridge Co., 78 Mo. App. 111; Shoe Co. v. Lisman, 85 Mo. App. 340. (3) Further on in the instruction the court erred in not limiting the recovery to negligence charged in the petition. It warranted a recovery for any negligence. Ely v. Railroad, 77 Mo. 34; Chitty v. Railroad, 148 Mo. 64; Haynes v. Trenton, 108 Mo. 123; Gerber v. Kansas City, 105 Mo. App. 191, — S. W. —; Kenney v. Railroad, 76 Mo. 254. (4) The instruction refers to "severe contusions, abrasions and concussions" received by respondent. This was error, as the evidence fails to show any of these things. It is error to refer to injuries the evidence does not support. Brake v. Kansas City, 100 Mo. App. 611; Memmerberg v. Railroad, 62 Mo. App. 658; Rhodes v. Nevada, 47 Mo. App. 499; Evans v. Joplin, 76 Mo. App. 20; Smith v. Railroad, 48 Mo. 367.

E. E. Hairgrove and *J. M. Cole* for respondent, filed lengthy argument.

ELLISON, J.—Plaintiff, claiming to have been seriously injured on one of defendant's sidewalks, brought this action for damages and prevailed in the trial court.

There was evidence tending to show that she fell from a defective sidewalk, while passing over it, in the exercise of ordinary care. The evidence further tended to show that plaintiff suffered severe and permanent injury on account of the fall. In our opinion the case made by the plaintiff justified the trial court in submitting it to the jury.

But there are several serious objections to instructions given at the instance of plaintiff. Instruction numbered one in express terms made it necessary that the sections of the sidewalk should be so "securely and

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safely bound together that they would be safe" for persons using the walk with reasonable caution and care. In instruction numbered three the jury were told, "that if you believe from the evidence that said sidewalk was defective and in a dangerous and unsafe condition for public use as described in plaintiff's first instruction," etc. The defendant by the first of these instructions was required to have the sidewalk in such condition that it would be unqualifiedly safe for pedestrians, and this was emphasized by the wording of the other with its reference to the first. They should not have been given in such form. They exact a higher duty of defendant than does the law. If the city keeps its walk in a *reasonably* safe condition it has discharged its duty. [Wallis v. Westport, 82 Mo. App. 522; Baustian v. Young, 152 Mo. 317, 325; Carvin v. St. Louis, 151 Mo. 334; Nixon v. Railroad, 141 Mo. 438; Smith v. Brunswick, 61 Mo. App. 578.]

It is suggested that while the instructions may be faulty in the respect mentioned, yet they are cured by others given in the case, especially in view of what plaintiff considers the great preponderance of the evidence as to the condition of the walk. We do not think so. In our opinion the plaintiff's instructions tended to exaggerate the conditions against the city to such a degree as to demand a new trial.

The further error appears in the instruction in referring to character of injuries which plaintiff did not receive. It frequently happens that there is more set out in a petition describing the injury than the evidence subsequently substantiates. Therefore, while the instruction should not, in any case, go beyond the petition, it should not go so far as the petition unless the evidence has given support to the allegations therein. The juries of the country have never been accused of parsimony in measuring damages against a city and it is, therefore, unfair, as well as a legal impropriety, to attempt to aggravate the plaintiff's case

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by words or phrases which exaggerate his injury, unless they are justified by both the petition and the evidence. The instruction submits the hypothesis of severe abrasions. This was justified by the language of the petition but not by the evidence in the cause.

An instruction offered by defendant was refused which, while in effect, informing the jury that they were not bound to accept the testimony of experts (the physicians) who were introduced, yet they had no right to disregard such testimony merely for the reason that it was given by experts. It has been repeatedly ruled by the Supreme Court that it was proper to give an instruction to the jury that they were not bound by the testimony of experts. [Hoyberg v. Henske, 153 Mo. 64; St. Louis v. Ranken, 95 Mo. 192; Hull v. St. Louis, 138 Mo. 618.] In view of that rule we are of the opinion that defendant was entitled to the converse as embodied in the refused instruction. We are not willing to say that the giving of such an instruction would, in all instances of expert testimony, be required; but in the circumstances of this case, we believe justice demanded it and that it was error to refuse it.

Other instructions are criticised, but we do not consider the criticism of substantial merit.

The judgment is reversed and the cause remanded. All concur.

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S. E. CHAMBERLAIN, Appellant, v. W. H. X. SMITH, Respondent.

Kansas City Court of Appeals, February 27, 1905.

1. **PAYMENT: Consideration: Part of Debt: Bona Fide Dispute.** The acceptance of a part of an admitted debt in discharge of the whole, will not bind the creditor for lack of consideration; but if there is an honest difference in regard to the amount due and the parties agree that the debtor may pay a less sum in full of the creditor's claim and the former does so, he is discharged.

2. ———: ———: ———: ———: **Instruction.** Modification of an instruction to correspond with the above rule is approved.

Appeal from Jackson Circuit Court.—*Hon. James Gibson,* Judge.

AFFIRMED.

Charles H. Winston for appellant.

(1) The petition being based upon an express contract for a fixed and definitely agreed price to be paid by defendant for services rendered by plaintiff, it was error for the court to refuse to give the jury the instruction numbered 1 as prayed by plaintiff. Winter v. Railroad, 73 Mo. App. 194, 160 Mo. 159; Griffith v. Creighton, 61 Mo. App. 4; Brown v. Baker, 99 Mo. App. 660; Deutmann v. Kilpatrick, 46 Mo. App. 29; K. B. Co. v. Schoennau, 32 Mo. App. 357; Swaggard v. Hancock, 25 Mo. App. 606; Goodson v. N. M. A. A. Co., 91 Mo. App. 339. (2) The amount paid by defendant on account rendered for preliminary sketches or studies of house and barn was not the full amount which defendant agreed by the contract of August 2, 1902, to pay for those preliminary sketches or studies. More-

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over, the amount so paid by defendant was never pretended to be paid for the work on the general drawings and specifications done under the express contract of August 2, 1902. Therefore, the second instruction asked by plaintiff ought to have been given by the court to the jury, and it was error to refuse to give it. See authorities supra.

I. N. Watson for respondent.

(1) We do not dispute propositions of law contained in the cases cited by appellant in his brief. The point of law is well stated in Winter v. Railroad, 160 Mo. 178; School Board v. Hull, 72 Mo. App. 409.

ELLISON, J.—Plaintiff is an architect and brought the present action against defendant on an account for professional services for drawing preliminary studies, plans, drawings, etc., for a dwelling house and a barn. The result in the trial court was in defendant's favor.

The evidence in behalf of plaintiff tended to prove that defendant engaged him to make "preliminary studies" for a house and a barn, and that he did so; that after defendant examined said preliminary work, he employed plaintiff to make general drawings, specifications and details for, and to superintend the construction of the buildings; that defendant agreed to pay therefor one per cent of the cost of the buildings for the preliminary work, and an additional one-half per cent for the general drawings, and an additional one per cent for the specifications, and an additional one per cent for detail drawings, and an additional one and one-half per cent for superintending the construction of such buildings. The cost of the building was estimated to be, for the house $30,000, and for the barn, $6,000. That plaintiff was to be paid as the separate services above stated were rendered. That plaintiff entered upon said employment and made the general drawings and the specifications; and that defendant

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thereby became indebted to him in the sum of $870; that thereafter defendant paid plaintiff $115 on such work, but refused to pay the balance of $755.

The evidence in behalf of defendant was for all practical purposes, in substance, a total contradiction of the contract as claimed by plaintiff. It further tended to prove that plaintiff rendered him an account for his services for $360, changed to $115 as follows:

"Mr. W. H. X. Smith,
"To S. E. Chamberlain, Dr.,
"Architect.
"This bill is now due.
"1902,
"Aug. 4th (1st) Bill rend.
for Archts. Services rendered (in pencil) $115.00
for House & Barn, (erased with pencil)..$360.00
Paid in full, S. E. Chamberlain.

"(N. B.—The figures "115.00" were written with indelible pencil, and the figures $360.00 were eraced with like pencil, but had been written with ink like body of bill.)

"(The words 'Paid in full. S. E. Chamberlain' and also the "115.00" were written with indelible pencil and the figures "$360.00" were erased with same pencil.)"

That he thereupon went to see plaintiff and told him the amount ($360) was much more than he should be charged; that he would not pay it; that it was "outrageous." That he told him he had not ordered him to go ahead on the detail drawings and specifications, etc.; that in their dispute defendant offered him $100, which he refused; that he then offered him $110, which was likewise refused; that he then proposed that to avoid any trouble and to "settle and have the whole thing done," he would give him $115, which plaintiff accepted and receipted the bill in full and said they would have no trouble.

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There is no doubt of the law relied upon by plaintiff, that when there is a definite and undisputed sum due another his naked agreement to accept a less sum in discharge of the whole will not be binding, for lack of consideration. See opinion of Judge GILL in Winter v. Railroad, 73 Mo. App. 173, adopted by the Supreme Court in 160 Mo. 159. But if there is an honest difference between the parties as to a liability, or as to the amount due, and the parties agree that the debtor may pay a less sum as in full of the creditor's claim, the debtor may do so and thereby discharge himself. [St. Joseph School Board v. Hull, 72 Mo. App. 403.] Where there is a dispute, in good faith, as to the amount due on a claim, the parties may make a binding agreement for a sum less than that claimed.

The trial court modified the principal instruction asked by plaintiff wherein his hypothesis of a right to recover on the case as made by the testimony in his behalf was set forth by adding thereto a proviso, that if there was an honest difference of opinion as to the amount due and that the payment of $115 was in compromise and full settlement of plaintiff's claim, the finding would be for the defendant. There is no doubt of the propriety of the action of the court in making the modification. The declarations of law made by the court were in all respects correct. The only question between the parties was one of fact. And since there was evidence tending to support the verdict we must affirm the judgment. What we have said, in effect, disposes of the point made in plaintiff's brief as to the action of the court on the instructions given and refused. We have examined the different points of objection made but can find nothing which would in any way authorize us to interfere with the judgment.

Affirmed. All concur.

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PERRIN & SHOEMAKER, Respondents, v. J. W. KIMBERLIN, Executor, etc., Appellant.

Kansas City Court of Appeals, February 27, 1905.

REAL ESTATE BROKER: Commission: When Earned. Where a broker produces to the landowner a purchaser ready and willing and enters into an enforcible contract to purchase, the broker has earned his commission and the fact that the sale is not consummated because defendant is unable to perform cannot affect the broker's right to recover his commission.

Appeal from Jackson Circuit Court.—*Hon. J. H. Slover,* Judge.

AFFIRMED.

L. H. Waters for appellant.

(1) It is only where a purchaser is found who is willing, able and ready to take the land or able to respond in damages if he fails, that the agent is entitled to recover commissions. Hayden v. Grillo, 35 Mo. App. 647; Finch v. Trust Co., 92 Mo. App. 271; Gelatt v. Ridge, 117 Mo. 553; Childs v. Litchfield, 66 Mo. App. 422. (2) The theory on which this case was tried ignored the requirement that the purchaser should be able, willing and ready to complete the purchase or able to respond in damages. (3) The court erred in refusing appellant's instructions numbered 1 to 6 inclusive. The contract prepared by plaintiffs required the payment of $500 at the time of the signing of the contract, and recited that the money was in their hands, when in fact it never was paid.

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Metcalf & Brady and *Glen Sherman* for respondents.

(1) We think that the facts standing as they do, undisputed in the evidence, entitle plaintiffs to recover and clearly justify the court in giving plaintiffs' first instruction. Childs v. Crithfield, 66 Mo. App. 422; Finch v. Trust Co., 92 Mo. App. 271; Harwood v. Diemer, 41 Mo. App. 49; Rieves v. Vette, 62 Mo. App. 440; Hayden v. Grillo's Admr., 42 Mo. App. 1.

ELLISON, J.—This is an action for commission alleged to be due plaintiff for making sale of certain real estate owned by defendant. The judgment was for plaintiff in the trial court.

The facts necessary to understand for disposal of the case are these: Plaintiff had the property in question for sale. He produced a purchaser ready, able and willing to buy. A price was agreed upon between the purchaser and defendant and they entered into a written contract setting out the terms of the sale. Among other provisions were these: That $500 was to be paid at the time the contract was signed. Defendant was to furnish a complete abstract of title within twenty days and the purchaser was to have ten days after its delivery to him in which to examine it. If the title was found defective defendant was to have a reasonable time, not to exceed thirty days, to cure defects. But if the defects could not be cured within that time, the contract was to be void and the $500 deposited should be returned. If it was found that the defendant had a good title in fee he was to execute a good and sufficient deed. It was undisputed that the $500 referred to in the contract was the purchaser's check for that sum on his bank of deposit in Kansas, and that such check would be left in charge of the Union National Bank of Kansas City.

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It turned out that the purchaser rejected the title as shown by the abstract on account of defect in title which could not be cured sooner than about two years.

At the time the check was given (April 17) the purchaser had more than $10,000 in the bank upon which it was drawn. This was drawn out on April 19. It is said that payment of the check was afterwards refused. We will assume that it was.

After making every allowance for the contention of defendant in support of his defense, the fact remains that plaintiff produced a purchaser to defendant not only ready, able and willing to buy, but who actually did buy, by contract of purchase. The contract is one which, if defendant himself could perform his part, he could enforce against the purchaser. The reason the contract cannot be enforced by defendant is that he is not able to perform himself. The mere fact that the $500 was not paid by the purchaser, when it clearly appears that he was a purchaser able to buy, cannot affect plaintiff after earning his commission.

The judgment is affirmed. All concur.

LOUIS FISHER, Respondent, v. JOHN R. CLOPTON, Administrator, etc., Appellant.

Kansas City Court of Appeals, February 27, 1905.

1. **ADMINISTRATION: Personal Dower: Deed of Separation: Contract.** A deed of separation fully performed during the life of the husband whereby the wife relinquishes her right, title and interest in any and all property held or owned or thereafter acquired by the husband, is sufficient to defeat the wife's statutory personal dower and year's maintenance, and such contract may be enforced after the husband's death.

2. ———: **Husband and Wife: Deed of Separation: Defense: Equity.** The object of a deed of separation is to divest the wife of her interest in the husband's property so that whenever and wherever she attempts to violate the contract its provisions can be interposed as a defense; and while a probate court has no

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equitable jurisdiction, it may entertain such a defense, especially since such courts in the allowance of demands against estates can allow equitable claims.

3. ———: Personal Dower: Deed of Separation: Jointure. A deed of separation is different from a settlement or jointure, and the wife need not in express terms renounce dower or other interests in her husband's property, and while she may renounce the provisions of a postnuptial jointure and take her statutory dower, such right does not exist in a contract for separation.

Appeal from Pettis Circuit Court.—*Hon. George F. Longan,* Judge.

REVERSED.

Barnett & Barnett for appellant.

(1) The court erred in finding for plaintiff and making an allowance to her out of her husband's estate. Under the deed of separation, shown by evidence, she is precluded and estopped from claiming anything out of her husband's estate. A deed or a contract of separation, by which the estate of the husband is divided, and a provision for the wife is made, is supported by a sufficient consideration is not against public policy. If it is fair and equal and not the result of fraud or coercion, it will be sustained. Randall v. Randall, 37 Mich. 571, 572; Roberts v. Hardy, 89 Mo. App. 86; 22 Am. and Eng. Ency. of Law (1 Ed.), 58, 67, 68; Walker v. Beal, 99 Wall. (U. S.) 743; Wallingsford v. Allen, 10 Pet. (U. S.) 583; Garver v. Miller, 16 Ohio St. 527; Houghton v. Houghton, 14 Ind. 505; Garbut v. Bowling, 81 Mo. 214. And the intervention of a trustee is no longer necessary. See authorities above cited. (2) Respondent tried this case on the theory that this was a jointure. She filed her renunciation of jointure in the probate court under section 5921, R. S. 1899. This is not a jointure. A jointure is a settlement made in contemplation of marriage, or in contemplation of the continuance of the marital relation, and is to take effect after the

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death of the husband. It is a competent livelihood of freehold for the wife of lands or tenements to take effect presently in possession or profit after the decease of her husband, for the life of the wife, at least. See Saunder v. Saunder, 144 Mo. 488; Roberts v. Hardy, 89 Mo. App. 92; R. S. 1899, section 2950. (3) A jointure is not made with the view of separation of a husband and wife, but more often in contemplation of marriage. Roberts v. Hardy, supra; Garbut v. Bowling, 81 Mo. 214. Also see authorities cited under first point of this brief.

John Cashman and *John D. Bohling* for respondent.

(1) Respondent does not contend that a valid contract of separation cannot be made under the laws of our State. But such contracts have been uniformly condemned by the courts, even when carried out by a valid agreement and bona fide separation; they are merely tolerated, and that only when every requirement of law has been strictly complied with. Walker v. Beal, 9 Wall.(U. S.) 743; Rogers v. Rogers, 4 Paige 516; Tyler on Infancy and Coverture, 467 and 468; Gonsolis v. Douchouguette, 1 Mo. 666, 670; Kerr v. Smith, 20 Wall 31, 36; Tyler on Infancy and Coverture, sec. 343, p. 475; Shethan v. Gregory, 2 Wend. 422; Walls v. Stout, 9 Cal. 479. (2) The wife's dower in her husband's lands cannot be barred, except by an express agreement, or by reason of her accepting a conveyance of land in which it is clearly expressed that it is granted and excepted in lieu of dower. Bealey v. Blake, 153 Mo. 657. (3) The same is true of the widow's absolute allowance under the statutes. Mowser v. Mowser, 87 Mo. 437; Farris v. Coleman, 103 Mo. 352. (4) A provision in a deed or will of a husband in favor of his wife will never be construed by implication to be lieu of dower or any other interest in

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his estate given by law; the design to substitute one for the other must be unequivocally expressed. Bryant v. McCune, 49 Mo. 546; Hasenritter v. Hasenritter, 77 Mo. 162. (5) The tendency of the appellate courts of Missouri is to favor the widow's statutory claims. King v. King, 64 Mo. App. 304. (6) The right of plaintiff as the widow of the deceased is absolute, and the statutory allowances vested in her immediately on the death of her husband. Roberts v. Hardy, 89 Mo. App. 86; Hastings v. Myers, 21 Mo. 519; Cummings v. Cummings, 51 Mo. 261; McFarland v. Baze's Admr., 24 Mo. 156; Griswold v. Mattix, 21 Mo. App. 282. (7) This right cannot be taken away by will. In re Klosterman, 6 Mo. App. 314; Glenn v. Glenn, 88 Mo. App. 442. (8) A contract between husband and wife, like the contract in the case at bar, is not enforcible at law. McBreen v. McBreen, 154 Mo. l. c. 328; Land v. Shipp, 50 L. R. A. (Virginia) 560.

ELLISON, J.—This proceeding was begun by plaintiff's application to the probate court of Pettis county for an allowance of $400, and a year's maintenance out of the personal estate of her deceased husband. On appeal to the circuit court an allowance of $400 was made, as also of $200, for a year's maintenance. The administrator has appealed to this court.

It was conceded that there was a personal estate of near $700, but defendant objected to the allowance to plaintiff on the ground that in the lifetime of the husband he and she had a contract by deed of separation whereby near $3,000, principally money and notes, was made over to her and she released all claim or interest to a small piece of real estate in Sedalia, of little value, and to all of his estate. That portion of the deed reads as follows:

"And I, Louise Fisher, wife of the said John Fisher, for and in consideration of the sum of twenty-seven hundred dollars ($2,700) heretofore given me by

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said John Fisher, and his agreement that said moneys shall be and remain my sole and separate, and individual property, do hereby relinquish to him all my right, title and interest in any and all property now held, or owned, or hereafter acquired by him, and for said consideration do hereby, at his instance and request, release and relinquish unto said Thomas Adolph Blickle all my right, title and interest, in and to the above-described lands.''

It was shown that plaintiff and deceased could not live together as husband and wife in peace and harmony. That they separated a time or two. That at one time they went to Little Rock, Arkansas, in which State it seems she had lived. They separated by mutual verbal agreement, he returning to Sedalia. She got possession of about all of his personal property (the principal portion of his possessions). She says with his consent, though he denied it. However that may be, she returned to him at Sedalia and they lived together again. But again they separated with an agreement as to the property which was afterwards carried out by the deed aforesaid. The separation was final; but upon his death, she presented the claims which are the subject of this controversy.

Some of the features of this case, so far as the principles of law are concerned, are determined by our decision, through Judge Broaddus, in Robert v. Hardy, 89 Mo. App. 86. It was there held that there may be a valid contract of separation and settlement of property rights between husband and wife, but a reconciliation will avoid and annul such contract. In this case there was a separation and some partial arrangement of property between the parties, when a reconciliation was had. But, finally, there was a final separation and the deed in question witnesses the final and complete disposition of property between the parties. In this final arrangement there can be no reasonable pretense of imposition so far as plaintiff is concerned, since she

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was in Little Rock represented by a reputable lawyer, as well as her relatives, deceased being represented in Sedalia by Judge Lamm. The deed prepared by the latter was altered at Little Rock to suit the views entertained by the wife and her counsel.

But it is insisted that there was no valid contract in this case, since it was made directly between husband and wife without the intervention of a trustee. Without reference to statutes enacted in recent years whereby the wife is in great part relieved of disabilities which formerly hampered her, we hold that after the husband's death, as in this case, there is no reason why such contracts may not be enforced. [Garbut v. Bowling, 81 Mo. 214, 220, 221; Randall v. Randall, 37 Mich. 563.] Especially may they be relied upon when, as in this case, they are merely interposed as a defense.

But it is said that the defense, if allowable at all, would be an equitable defense; and as the probate court has not jurisdiction in equity, it cannot be allowed in this case. We are satisfied that the defense, as such, may be made in the probate court. The object of the separation settlement was to adjust all property relations between the couple and to divest her of all interest in his property which she otherwise would have had by reason of the relationship of husband and wife. So that whenever and wherever she attempted to violate that contract, its provisions could be interposed as a defense. It is true that it has been held by the Supreme Court that such contracts could not be enforced except in equity. [McBreen v. McBreen, 154 Mo. 323.] But there is no attempt here to enforce, or to have the contract specifically performed. The effort here is merely to defend. The Supreme Court said that while the contract was not enforcible at law, it did not follow that it might not be successfully interposed as an equitable defense to an action brought in disregard of its terms.

But, aside from such consideration, it has been

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frequently decided in this State that while the probate court has not general jurisdiction in equity, yet so far as concerns claims against estates, such courts may allow demands which are equitable as distinguished from legal. [Hammons v. Renfrow, 84 Mo. 341; Hoffman v. Hoffman, 126 Mo. 486; Winn v. Riley, 151 Mo. 61; Todd v. Terry, 26 Mo. App. 598; Reynolds v. Reynolds, 65 Mo. App. 415; Maginn v. Green, 67 Mo. App. 616; Church v. Church, 73 Mo. App. 421; Grimes v. Reynolds, 94 Mo. App. 576.] It would appear to logically follow that if such court has jurisdiction over a claim of such character when presented as a demand against an estate, it would have jurisdiction over a defense founded in equity when presented against the allowance of a demand. It would be a singular inconsistency to say that the probate court had lawful authority to allow a demand of an equitable nature against an estate and yet not have authority to entertain a defense to such demand of a like nature.

A portion of the case as presented by the plaintiff would indicate that she considers there must be an express stipulation in the contract between husband and wife whereby she, in terms, expressly renounces dower or other interest in her husband's property. That view would be applicable to a case involving a contract for jointure before marriage. [R. S. 1899, section 2950; Perry v. Perryman, 19 Mo. 469; Farris v. Coleman, 103 Mo. 360; Saunders v. Saunders, 144 Mo. 482.] And also, it seems, even if such contract be in the nature of jointure and made after marriage. [Perry v. Perryman, supra.] But the defense in this case is not based on jointure, but a contract of separation. And while it must appear in such contract that it was the intent and purpose to renounce all claim in the husband's property, yet there is no statutory requirement that such purpose must be stated in express terms. As pointed out in Roberts v. Hardy, supra, there is a great difference between a contract for jointure and a con-

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tract for separation. In postnuptial jointure the widow may renounce such provision and take her statutory dower. [R. S. 1899, section 2951.] But no such right is given in cases of contract for separation. The latter class of contracts, though they are postnuptial, are not revocable at the will of the wife, or widow. So, therefore, we rule that the plaintiff in this case is barred of her right to the allowances claimed, and the judgment will be reversed.

All concur.

V. H. IGO et al., Plaintiffs in Error, v. TIP BRADFORD et al., Defendants in Error.

Kansas City Court of Appeals, February 27, 1905.

1. **APPELLATE PRACTICE: Writ of Error: Notice: Waiver: Brief.** Plaintiffs in error filed their abstract and brief. Defendants in error thereupon filed their statement and brief, addressed solely to the merits of the case. Subsequently defendants in error filed a motion to dismiss the writ for want of notice thereof. *Held*, the filing of the briefs without reference to any defect in the proceedings relating to the writ constitute a general appearance thereto and waived the objection to the sufficiency of notice.

2. **JUSTICES' COURTS: Appeal: Notice: Signature.** A notice of appeal should strictly comply with the statute, but it is only intended to notify, and if, under a fair and reasonable interpretation, it does this, it is sufficient, and the signature of the attorneys of the appellant is sufficient and pronouns used in the notice will refer to the appellant and not the attorneys.

Error to Pettis Circuit Court.—*Hon. Geo. F. Longan*, Judge.

REVERSED AND REMANDED.

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Bente & Wilson and *R. A. Higdon* for plaintiffs in error.

(1) The contention of the defendants in error is that the notice of appeal was not sufficient. We contend that said notice was amply full and sufficient, and it conformed to the following requisite. (a) It was in writing and described the case fully and gave the date upon which judgment was rendered against plaintiff. R. S. 1899, sec. 4074; Tiffin v. Millington, 3 Mo. 418; Fagan v. Separator Co., 92 Mo. App. 236; Celia v. Schnairs, 42 Mo. App. 320. (b) It was signed by the appellant or by his attorney or agent. Celia v. Schnairs, 42 Mo. App. 316. (c) It describes the cause by the names of the parties. McGuiness & Ingals Co. v. Taylor, 22 Mo. App. 513; Hammond v. Kroff, 36 Mo. App. 118; Drug Co. v. Hill, 61 Mo. App. 684. (d) It was given by an agent which is good. Runkle v. Hogan, 3 Mo. 234; Celia v. Schnairs, 42 Mo. App. 316. (e) The form of the notice was sufficient. Richmonds v. Isaacs, 4 Mo. App. 566; State ex rel. v. Hammond, 92 Mo. App. 231. (2) The notice must be given in the manner prescribed by the statutes. Jordan v. Bowman, 28 Mo. App. 608. (a) The appellant has the legal right to exact written notice which was given in this case. Walker v. Carrew, 56 Mo. App 320; Drug Co. v. Hill, 61 Mo. App. 684; R. S. 1899, section 4074; B. & S. Assn. v. Moulter, 5 Mo. App. 587; Byrd v. Steele, 49 Mo. App. 419.

W. D. Steele for defendants in error.

(1) There is only one question for the court to decide in this case and that is, whether the pretended notice of appeal is sufficient. R. S. 1899, sec. 4074. And if the appellant fails to give such notice of his appeal, when such notice is required, the cause shall, at the option of the appellee, be tried at the next term, if

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he shall enter his appearance on or before the second day thereof. R. S. 1899, secs. 4075, 4076; Drug Co. v. Hill, 61 Mo. App. 684; Schnabel v. Thomas, 92 Mo. App. 180; Thomas v. Ins. Co., 89 Mo. App. 12; Hammond v. Kroff, 36 Mo. App. 121; Hardware Co. v. Taylor, 22 Mo. App. 516.

JOHNSON, J.—A motion has been filed by defendants to dismiss the writ of error. The only point made therein which we deem of sufficient importance to notice is that the written notice required by R. S. 1899, section 852, was not served twenty days before the return day of the writ. The proceedings were as follows:

February 16, 1904, writ of error issued returnable first day of March term, 1904, which was March seventh.

February 26, 1904, return made by circuit clerk.

February 24, 1904, written notice of writ served upon attorneys of record of defendants in error.

December 6, 1904, plaintiffs' abstract, statement and brief served upon defendants.

December 24, 1904, defendants' abstract, statement and brief served upon plaintiffs.

January 2, 1905, motion to dismiss filed, notice of which motion was served upon plaintiffs December 31st, 1904.

The statement and brief of defendants were addressed solely to the merits of the case, no reference being made therein to any defect in the proceedings relating to the writ. As they were served upon plaintiffs—in fact, filed here—before the filing of the motion to dismiss, we must hold that defendants appeared generally to the writ, thereby waiving the objection to the sufficiency of the notice. [Kenner v. Doe Run Lead Co., 141 Mo. 248.] It is not necessary to consider the point further. The motion is overruled.

The case originated in a justice court in an action

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brought by the plaintiffs in error against defendants in error. Judgment was rendered in favor of defendants from which plaintiffs appealed to the circuit court. A motion was filed in the latter court by defendants to dismiss the appeal because of the want of notice thereof. But the real ground of the motion was the insufficiency of the notice given to meet the requirements of the statute. The notice complained of was as follows.

"Before John B. Hughes, J. P., Cedar township, Pettis county, Missouri.

"V. H. Igo, Lewis R. Lee, Plaintiffs, v. Tip Bradford, Lon Lewis, Defendants.

"To the above-named defendants or W. D. Steele, their attorney:

"You are hereby notified that we have taken an appeal to the circuit court of Pettis county, Missouri, from the judgment of John B. Hughes, J. P., within and for Cedar township, Pettis county, Missouri, rendered by him on the 10th day of November, 1902, against us in the above-entitled cause.

"R. A. Higdon and Bente & Wilson,
"Attorneys for Plaintiffs."

Endorsed upon said notice was the following acceptance of service thereof.

"I hereby accept service of the above notice this 17th day of November, 1902.

"W. D. Steele,
"Attorney for Defendants."

It is conceded the attorneys who signed this notice represented plaintiffs in the justice court.

Two points are made against the notice: First, that it is not signed by the appellants either in person or by their agents or attorneys, but by the lawyers for themselves, the words "attorneys for plaintiffs" being merely discriptive of the persons who signed; second, the notice fails to describe any judgment rendered against the appellants, the words "we" and "us,"

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which appear therein, having reference to the persons who signed—the attorneys and not to the appellants.

While it is true that in order to constitute a valid notice of appeal strict compliance with the requirements of the statute is essential—[Cella v. Schnairs, 42 Mo. App. 320; Smith Drug Co. v. Hill, 61 Mo. App. 680; Tiffin v. Millington, 3 Mo. 418]—this does not mean that a strained and unduly technical construction is to be applied to the language employed. The object of the notice is to notify, and if under a fair and reasonable interpretation it does this, it should not be held insufficient because of other possible but unnatural meanings which might be twisted out of it by an ingenious mind. This was a simple suit upon debt with a counterclaim by defendants. The attorneys were not parties and but one judgment was rendered against plaintiffs. The case is not like that of Smith Drug Co. v. Hill, supra, largely relied upon by defendants. There the action was in garnishment in which three judgments were rendered: one between the parties upon the debt, one against the garnishee, and one taxing costs. The appellant was the garnishee and she did not state in the notice from which judgment she appealed, and the notice was signed, "Porter & Spencer, Attorneys for defendant," when it was not defendant but the garnishee who was taking the appeal. In that case we said: "More than this, the statute requires the notice of appeal to be given by the appellant and to be in writing signed by said appellant or his or her attorney or agent." In this case the notice was signed by the attorneys for appellants and so stated. The words "attorneys for plaintiffs" clearly meant to convey the information that the signatures were attached in a representative capacity and were not merely descriptive. They do not fairly admit of any other construction and it is not said, nor would it be believed, that the appellee was in any manner misled.

The statute—Revised Statutes, section 4074—does

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not in express terms require the notice to be signed, but the courts have held this to be necessary to a valid notice; for without any signature it is no notice, but merely so much waste paper. But we know of no peculiar sanctity enveloping such notices. If they are signed by attorneys in a manner customarily employed in signing other notices and pleadings, this should suffice.

What we have said necessarily disposes of defendants' second point, for if the signature is to be treated as that of the appellants by their attorneys it necessarily follows the words "we" and "us" refer to them and not to their representatives. With such construction, the requirement of the statute—Revised Statutes, section 4074—that the judgment appealed from be specified, is satisfied. There is no misdescription of the judgment. We think the rule followed by our sister court in St. Louis in the case of Coal Co. v. Railroad, 48 Mo. App. 578, the correct and rational one to apply in cases of this character.

It follows the judgment must be reversed and the cause remanded. All concur.

JOSEPH MORRIS, Respondent, v. NANCY C. PARRY, Appellant.

Kansas City Court of Appeals, February 27, 1905.

1. **EQUITY: Perpetuation of Testimony: Statute: Common Law.** A petition seeking to the establishment as evidence in a pending dower action of a certain deposition of a deceased person, given in an action between others, is held not to be a proceeding within the statute for the perpetuation of testimony, nor in equity, since any remedy legal or equitable having for its object the perpetuation of testimony is confined to the testimony of witnesses in being; and said petition set out in the opinion does not state a cause of action.

2. **———: Aiding Law: Invading Legal Rights: Evidence.** However farreaching and puissant the arm of equity, it only sup-

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plements and aids the law but does not invade its domain and never works to the destruction of legal rights or in opposition thereto; and will not attempt to force the admission of incompetent testimony at the trial of a dower suit.

3. **EVIDENCE: Hearsay: Cross-Examination.** The vital and determinative reason for rejecting hearsay testimony is the desirability of testing all testimonial assertions by oath and by cross-examination, but while a party is only entitled to a fair opportunity for cross-examination, yet in the case presented in the petition considered it cannot be held that the same motive existed for cross-examination, in an action by a defendant party against plaintiff when she was under coverture that exists in a pending action brought by her against a different person to establish her dower.

4. **EQUITY: Laches: Perpetuation of Testimony.** A lapse of ten years after the intention of the plaintiff to assert dower in certain lands in event she survived her husband became known without any steps to establish his title or bar the inchoate dower right or perpetuate testimony establishing his title, constitutes laches and the claim becomes too stale to afford equity in claimant's favor.

Appeal from Barton Circuit Court.—*Hon. R. J. Tucker*, Special Judge.

REVERSED.

Wright Bros. & Blair and *Ragsdale Bros.* for appellant.

(1) This suit is not brought under sections 4525, 4542, Revised Statutes 1899. (2) There is nothing in the case justifying the conclusion that this proceeding is designed to meet the requirements of sections 4565, 4571, Revised Statutes 1899. (3) This is not a bill to perpetuate testimony. 1 Greenleaf on Ev., sec. 325; 3 Greenleaf on Ev., sec. 325; 16 Ency. of Plead. and Prac., 353-359; 2 Story's Eq. Jur., secs. 1505-1508; 1 Chitty, Gen'l Prac. (2 Am. Ed.), sec. 733; Adams, Eq. (7 Am. Ed.), sec. 23; 2 Burrill's Law Dict.; 1 Bouvier's Law Dict.; 1 Pomeroy's Eq., secs. 82, 211, 212, 215; Bispham's Eq. (3 Ed.), sec. 573. (4) This cannot be

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regarded as a proceeding *de bene esse*. 2 Story's Eq. Jur., secs. 1513-1516; Adams' Eq., sec. 24; 1 Pomeroy's Eq., secs. 25, 215; Bispham's Eq. (3 Ed.), secs. 35, 567. (5) Equity has no jurisdiction where there is an adequate remedy at law. Cable v. Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74. (6) Courts of equity will not entertain a bill whose sole purpose is to secure a decree that a court of law in a pending case shall rule a certain way on a mere question of the admissibility of evidence.

Thurman, Wray & Timmonds for respondent.

(1) The fact that no precedent can be found for granting relief, under circumstances similar to the case at bar, is no reason for refusing the relief. Courts of equity were created for the purpose of furnishing a remedy where a right exists, without which there would be a failure of justice. Railroad v. Pennsylvania Co., 19 L. R. A. 395; Joy v. St. Louis, 138 U. S. (33 L. Ed.) 843; Gavin v. Curtin, 171 Ill. 640, 40 L. R. A. 776; Dodge v. Cole, 97 Ill. 338, 37 Am. Rep. 122; Joy v. St. Louis, 138 U. S. (34 L. Ed.) 843; Bispham's Equity (3 Ed.), 53. (2) Equity will devise a remedy to meet each new emergency, and will enforce that remedy if the ends of justice require it. It is for such exigencies that a court of equity exists. Guarantee Co. v. Hambleton, 84 Md. 456, 40 L. R. A. 216. (3) This evidence must be regarded as competent upon the principle of *ex necessitate rei*. Under the allegations in the bill, it is necessary to prevent claims which are a fraud upon property-owners. Moeckel v. Heim, 134 Mo. 576. (4) Courts of equity were established to furnish remedies in cases wherein the law, on account of its universality, is deficient. 1 Story's Eq. (12 Ed.), sec. 3. (5) One of the ancient jurisdictions of a court of equity was to perpetuate testimony. 2 Story's Eq. Juris., sec. 1513, note 3; Adam's Eq., p. 23, chap. 2; 3 Blackstone, Com., 438. (6) Courts of law have no authority to perpetuate

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testimony, but courts of equity are constantly exercising such jurisdiction. 2 Story's Eq. Juris., sec. 1514.

JOHNSON, J.—This is a suit in equity begun in the circuit court of Barton county. Defendant demurred to the petition on two grounds—no cause of action and lack of jurisdiction over the subject-matter. The demurrer was overruled, whereupon defendant declined to plead further and a decree was entered granting the relief prayed for. The correctness of this action of the court is before us for review on defendant's appeal.

The facts constituting the alleged cause of action are contained in averments copied from the petition as follows:

"That this defendant, on the ninth day of September, 1903, filed her petition in this court, alleging in said petition that she is entitled to a dower interest in ten feet off of the east end of sixty feet off of the south end of lot one, in block twelve of the original town, now city of Lamar, Missouri, alleging in her said petition that she is entitled to such dower interest as the widow of Joseph C. Parry, deceased, who was seized of an estate in fee in said real estate during his lifetime. The plaintiff herein, as defendant in the suit, denied the alleged right of the said Nancy C. Parry to dower in said real estate, and said cause of action is now pending in this court for determination. Plaintiff further states that the said Joseph C. Parry, being the owner of the land hereinafter described, on or about the first day of December, 1856, joined by his then wife, Josephine Parry, by good and sufficient warranty deed, conveyed to Barton county, Missouri, as a place for the county seat of said county the southwest quarter of the northwest quarter and the west half of the west half of the southeast quarter of the northwest quarter of section 30, township 32, of range 30, Barton county, Missouri, which first-described land is included in the land last

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hereinbefore described, and which said deed, so made and executed by said Joseph C. Parry and his then wife, Josephine Parry, was, in due form of law, acknowledged and all dower interest therein released; that said deed, so made, executed and delivered to Barton county, was, on the — day of ——, 1856, duly filed for record and recorded in the office of the recorder of deeds within and for Barton county, Missouri, and then became an important link in the record title to the last above-described real estate; that afterwards, to-wit: On the — day of ——, 1857, said real estate so conveyed to Barton county for county seat purposes was selected as the permanent county seat of the said county, and the town of Lamar duly laid off on said tract of land into lots . . . and a plat thereof duly made and approved. Plaintiff herein further states that, during and by reason of the late War of the Rebellion, the said deed from the said Joseph C. Parry and his then wife, Josephine Parry, to Barton county, and the record thereof, the plat of the town and the record thereof, together with a great number of records, were completely lost and destroyed at the time the public courthouse, in which said records were kept, was destroyed by fire. Plaintiff avers the fact to be that he holds title to the said real estate described as ten feet off of the east end of sixty feet off of the south end of lot 1, block 12, of the original town, now city, of Lamar, Missouri, by mesne conveyance from Barton county, to whom the said Joseph C. Parry and his then wife, Josephine Parry, made said conveyance as aforesaid; that after the execution of said deed by Joseph C. Parry and his then wife, Josephine Parry, the said Josephine Parry departed this life, and the said Joseph C. Parry, on the — day of ——, 186—, was married to this defendant, Nancy C. Parry. Plaintiff further states that the loss of said deed, and the record thereof, to Barton county, so made by the said Joseph C. Parry and his then wife, Josephine Parry, became known, and

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the said Joseph C. Parry, for the purpose of supplying said lost deed, on the — day of ——, 18—, made and executed another deed in lieu thereof, but the said Nancy C. Parry refused to join in said last-mentioned deed, and made known the fact that she would claim an interest in the last above-described land if she survived her husband, Joseph C. Parry. And afterwards, on or about the — day of January, 1894, one R. P. Smith, who at that time owned a part of the said southwest quarter of the northwest quarter and the west half of the west half of the southeast quarter of the northwest quarter of said section 30, township 32, of range 30, Barton county, Missouri, instituted suit against this defendant, Nancy C. Parry, and her husband, Joseph C. Parry, who was then living, for the purpose of establishing and making record of said deed from said Joseph C. Parry and his then wife, Josephine Parry, to said Barton county, and to establish, perpetuate and make a matter of public record such evidence as the plaintiff in that cause, to-wit, R. P. Smith, might produce. Plaintiff further states that the said R. P. Smith. to establish his said cause of action against the said Joseph C. Parry and Nancy C. Parry, and to perpetuate and make a matter of public record testimony establishing the existence of said deed so made by Josephine Parry and Joseph C. Parry, and the real estate so conveyed to Barton county, Missouri, for county-seat purposes, took the deposition of one John H. Winkle, after due notice to said Joseph C. Parry and Nancy C. Parry this defendant, which said deposition, after being taken in due form of law, was filed in said cause of R. P. Smith v. Joseph C. Parry and Nancy C. Parry in the circuit court of Barton county, Missouri, where the same has ever since been preserved among the records of this court, as taken; that, at the time of the taking of said deposition, the said John H. Winkle was over seventy years of age and in a weak and feeble condition; that the said John H. Winkle, in his said deposi-

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tion so taken, testified to state of facts showing the execution, acknowledgment and delivery of said warranty deed from said Joseph C. Parry and his then wife, Josephine Parry; that since the taking of said deposition, the said John H. Winkle has departed this life, and, owing to the great number of years which have elapsed since the execution of the said deed from said Joseph C. Parry and his then wife, Josephine Parry, and the destruction of the records as aforesaid, it is impossible to establish the facts concerning the execution of said deed by reason of the fact that all persons known to this plaintiff who had personal knowledge of the execution and delivery of said deed, have since departed this life. Plaintiff further states that the said Joseph C. Parry and Nancy C. Parry, well knowing of the existence of such conditions, made a quitclaim deed to the said R. P. Smith in and to the land owned by him and described in his said petition, in the original town, now city, of Lamar, Missouri, and a part of the tract of real estate so conveyed by said Joseph C. Parry and his former wife, Josephine Parry, to Barton county, for county-seat purposes, before the suit of R. P. Smith was heard and determined, and the testimony of the said John H. Winkle was perpetuated in the manner provided by law, and executed to the said R. P. Smith a quitclaim deed disclaiming any interest in the said real estate described in his petition; and thereby compelled him to dismiss said suit. Plaintiff avers the fact to be that the said Joseph C. Parry and Nancy C. Parry, this defendant, so made, executed and delivered this quitclaim deed to the said R. P. Smith for the purpose of depriving all other persons owning land within the fifty-acre tract conveyed by said Joseph C. Parry and Josephine Parry to Barton county for county-seat purposes, from having the benefits of the testimony of the said John H. Winkle, so taken upon due notice as aforesaid, and this plaintiff is now deprived of the use of said evidence by such action on

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the part of said Joseph C. Parry and Nancy C. Parry. Plaintiff avers the fact to be that, in equity and good conscience, he should be permitted to use the testimony of the said John H. Winkle as taken upon due notice as aforesaid and on file in the office of the clerk of this court in the said cause of R. P. Smith v. Joseph C. Parry and Nancy C. Parry for the purpose of establishing to the real estate as aforesaid, and for the purpose of establishing the fact that the said Nancy C. Parry is not entitled to dower interest in said real estate, as claimed in her said petition in her said suit against this plaintiff; that this plaintiff is wholly without remedy at law and invokes the aid of this court of equity to establish and perpetuate the testimony of the said John H. Winkle so taken as aforesaid."

The relief granted by the court under this strange petition is contained in the following portion of the decree, "that the testimony of John H. Winkle incorporated in the deposition of said John H. Winkle on file in the office of the clerk of the circuit court of Barton county in the case of R. P. Smith against Joseph C. Parry and Nancy C. Parry, defendants, be and the same *is hereby established and perpetuated* as and for the testimony of the said John H. Winkle for the purpose of establishing the existence of said deed of said Joseph C. Parry and Josephine Parry to Barton county . . . and in all suits by Nancy C. Parry having for the purpose the establishment of a right of dower in her as the widow of Joseph C. Parry in and to said real estate against all persons whomsoever the same is hereby decreed to be competent testimony." A certified copy of the decree was ordered to be filed and recorded in the office of the recorder of deeds.

This proceeding does not fall within the purview of statutory law—Revised Statutes, sections 4525-4542 and 4565-4571—nor is the remedy sought one known to equity jurisprudence. Every remedy, legal or equitable, having for its object the perpetuation of testi-

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mony, is confined to the testimony of witnesses in being. [1 Greenleaf on Ev., sec. 325; 3 Greenleaf on Ev., sec. 325; Story's Eq. Juris., secs. 1505-1508; Bispham's Prin. of Eq., secs. 535, 567 and 573; Adams's Eq., sec. 24.]

Respondent, freely conceding that no precedent exists in support of his novel claim, invokes the aid of the general power inherent in equity to provide a remedy where one is lacking for the protection of a right under the maxim, "equity will not suffer a right to be without a remedy." It is true, as urged: "Every just order or rule known to equity courts was born of some emergency to meet some new condition and was, therefore, in its time without precedent." And "the powers of a court of equity are as vast and its processes and procedure as elastic as all the changing emergencies of increasingly complex business relations and the protection of rights can demand." But however far-reaching and puissant the arm of equity may be, it has its sphere of operation to which it is confined. It supplements and aids the law, does not invade its domain and never works for the destruction of legal right nor in opposition thereto. "Equity will not give a remedy in direct contravention of a positive rule of law." [Bispham's Princ. of Eq., sec. 37; Story's Eq. Juris., sec. 12.]

What is the real aim and object of this proceeding? Stripped of verbal embellishments and reduced to naked fact, it is an attempt to force the admission of incompetent testimony at the trial of the dower suit. That the evidence is incompetent is confessed and urged as a ground for equitable relief. If competent, there is abundant authority in this State justifying its admission without the aid of equity. [Breeden v. Feurt, 70 Mo. 624; Davis v. Kline, 96 Mo. 401; Coughlin v. Haeussler, 50 Mo. 126; Parsons v. Parsons, 45 Mo. 265; Building Assn. v. Kleinhoffer, 40 Mo. App. 399.] The decree in this case presents the anomaly of a court

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sitting as a chancellor making an order upon himself as trial judge to admit as evidence in an action pending before him in the latter capacity, the deposition of a deceased witness taken in another cause clearly incompetent under elementary principles of law, for this is all the decree amounts to. The attempt to establish the deposition as a sort of muniment of title manifestly is such an excess in this action to which plaintiff and defendant are the sole parties that it does not call for serious consideration.

The testimony of the witness, now deceased, taken in the form of a deposition over ten years ago in the suit of Smith against the defendant herein and her husband, is incompetent as evidence in the pending dower suit brought by defendant against plaintiff, for the reason that it is hearsay. It is true, the question of title involved in the pending cause is the same as in Smith against this defendant, but the parties are different and there is no privity between the plaintiff in the last-mentioned action and the defendant in the one pending. The land involved in the two suits also is different. Defendant herein was at the time of the pendency of the Smith action under coverture, and possibly may have acted under some restraint imposed by her husband. It is not shown she appeared and cross-examined the witness. For various reasons she may not have cared to do so, nor to contest Smith's claim, knowing that at law the effect of her conduct in that suit would not impair nor affect her right of dower to other lands owned by other persons. It is immaterial, however, to her right in the pending dower action whether or not, having opportunity to do so, she appeared and cross-examined the witness. The respect in which she is deprived of her legal right, if the decree herein is sustained, is that her title will be assailed by the testimony of a witness without a fair opportunity being given her to confront and cross-examine him. Without such opportunity the witness's testimony as to the issues in

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the pending suit is *ex parte*, possessed of no greater probative dignity and force than a mere affidavit.

Greenleaf states the rule applicable as follows: "The truth seems to be that, among the preceding reasons for rejecting hearsay assertions, the vital and determinative one is that stated at the beginning of this section, namely, the desirability of testing all testimonial assertions by the oath *and by cross-examinations.*" [Section 99a.] The same author also says, section 163, "the hearsay rule imposes—cross-examination and confrontation." And further on in the same section, discussing the very subject here under consideration: "As to the *parties,* all that is essential is that the present opponent should have had a fair opportunity of cross-examination, consequently a change of parties which does not affect such a loss does not prevent the use of such testimony—as, for example, a change by which one of the opponents is omitted, or by which a merely nominal party is added. And the principle also admits the testimony where the parties, though not the same, *are so privy in interest*—as where one was an executor or perhaps a grantor *that the same motive* and need for cross-examination existed." The application is apparent. It cannot be said, as a matter of law, the same motive existed for cross-examination in the former action as now exists; nor that, there being no privity, the dower claimant was under legal obligation to anticipate that the testimony of a witness taken in a case about which she may have cared nothing, or which she may have been influenced by her husband not to contest, would be raised in the future to the dignity of a muniment of title to destroy her right of dower even against parties who were strangers to that proceeding.

But even if the remedy invoked is one a court of equity may enforce, the plaintiff has come under the ban of the rule laid down in the maxim: "*vigilantibus, non dormientibus, aequitas subvenit.*" According to the allegations of the petition, many years ago the de-

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fendant refused to relinquish her claim of dower in the tract of land which included the lot now in controversy, and announced her determination to hold her said right and to assert it in the event it became absolute. Her attitude became a matter of general knowledge in the community. In 1894, more than ten years ago, Smith, doubtless uneasy over the possibility of such claim being enforced against him, brought suit to establish his title. From these facts it is apparent the plaintiff and his predecessors in interest knew for many years of the claim hanging over them. During all that time the courts were open to him and the evidence available with which to establish his title and effectually bar defendant of her dower claim. Instead of bringing timely action for this purpose in a court of law, or of taking steps to perpetuate testimony, plaintiff slept upon his rights, watched his witnesses die off, wagered upon the race of life between defendant and her husband, and lost. His claim is too stale to afford any equity in his favor.

It follows that the petition does not state a cause of action. The judgment is reversed and the petition dismissed. All concur.

CARL LOWENSTEIN, Respondent, v. MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, February 27, 1905.

NEGLIGENCE: Pleading: Evidence: Instruction. While a general charge of negligence will suffice, yet, if followed by particulars the latter become the issues, and the plaintiff may not broaden them by evidence or instruction.

Appeal from Jasper Circuit Court.—*Hon. Hugh C. Dabbs,* Judge.

REVERSED AND REMANDED.

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Martin L. Clardy, E. O. Brown and *George W. Crowder* for appellant.

(1) Having specifically alleged just what acts of negligence caused the injuries complained of, plaintiff must be confined to the negligence pleaded, and, therefore, cannot prove something not among those named. Ely v. Railroad, 77 Mo. 34; Bohn v. Railroad, 106 Mo. 434; Cunningham v. Journal Co., 95 Mo. App. 47; Garven v. Railroad, 100 Mo. App. 621; Lien v. Railroad, 79 Mo. App. 475; Gro. Co. v. Railroad, 89 Mo. App. 534; Peterson v. Railroad, 156 Mo. 552; Huggart v. Railroad, 134 Mo. 673; Watson v. Railroad, 133 Mo. 246; Lane v. Railroad, 132 Mo. 4; Payne v. Railroad, 136 Mo. 562; Spillane v. Railroad, 135 Mo. 414; Ridenhour v. Car Co., 102 Mo. 287; Cogan v. Railroad, 101 Mo. App. 179; Myers v. Railroad, 103 Mo. App. 268. (2) And under the well-settled rulings of this court the issues made by the pleadings cannot be broadened by the instructions. Aston v. Transit Co., 79 S. W. 999; Breeden v. Min. Co., 103 Mo. App. 176, 76 S. W. 731; Garvin v. Railroad, 100 Mo. App. 621; O'Brien v. Loomis, 43 Mo. App. 34; Bohn v. Railroad, 106 Mo. 429; Ely v. Railroad, 77 Mo. 34; Gurley v. Railroad, 93 Mo. 445; Cunningham v. Journal Co., 95 Mo. App. 47; Waldhier v. Railroad, 71 Mo. 513; Schnider v. Railroad, 75 Mo. 295; McCarty v. Hotel Co., 144 Mo. 402; Chitty v. Railroad, 148 Mo. 75; Watson v. Railroad, 133 Mo. 246; Conway v. Railroad, 24 Mo. App. 235; Adolph v. Baking Co., 100 Mo. App. 214.

Howard Gray for respondent.

(1) The objections made to instruction numbered 1 are twofold. First, that the issues submitted were broader than the pleadings; and second, that the court should have told the jury what was an unsafe and dangerous crossing instead of leaving it to the jury to de-

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termine under the evidence. It has always been the rule in this State that such matters are for the jury and not for the court. Kinney v. Springfield, 35 Mo. App. 97; Clay v. Railroad, 24 Mo. App. 39; Huhn v. Railroad, 92 Mo. 440; Tabler v. Railroad, 93 Mo. 79.

ELLISON, J.—The plaintiff was thrown from the top of a wagon load of baled hay as he was going over one of defendant's crossings of its track near its station at Jasper, in Jasper county. He received an injury for which he brought this action alleging the negligence of the defendant in constructing the crossing. He prevailed in the trial court.

The negligence upon which the action is based is specifically charged to be that, "while defendant had attempted to construct a crossing over its said track, which it invited the public to pass over, yet the same was carelessly and negligently permitted to become dangerous, as follows: The defendant had placed a board or boards on the inside of the rails between its said track at said point and on the outside thereof at said places, and had carelessly and negligently filled in between said boards and in the middle and center of its track with soft and fresh gravel so that a loaded wagon passing off of said boards would drop through said gravel to a great depth, to-wit: A foot or more and thereby cause a person to pitch or be thrown from the wagon or vehicle on which he was riding at the time."

Under such specific charge no other ground of negligence should have been submitted to the jury. For, while a general charge will suffice, yet if the complaining party sets out the particular negligence such particulars become the issues and he has no right to broaden them by submitting other acts to the jury. [Chitty v. Railroad, 148 Mo. 64; McCarty v. Hotel Co., 144 Mo. 397, 402; Cunningham v. Journal Co., 95 Mo. App. 47; Garven v. Railroad, 100 Mo. App. 617.]

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In disregard of this rule, plaintiff obtained an instruction over the protest of defendant wherein was submitted to the jury the question whether defendant attempted to repair or reconstruct its crossing; and whether in doing so it raised its tracks. Neither of these things is among the charges of negligence which we have set out above from plaintiff's petition, and it was, therefore, error to submit them to the jury.

As the case is to be retried, we will add that the objections made by defendant to evidence of the condition of the approaches to the crossing and of unsound planks at the south end of the crossing, in view of the petition, were well taken; but as no exception was saved to the court's ruling, defendant cannot now complain.

We have not discovered any other substantial error and the judgment will be reversed and cause remanded for new trial. All concur.

B. E. WILBUR, Respondent, v. SOUTHWEST MISSOURI ELECTRIC RAILWAY CO., Appellant.

Kansas City Court of Appeals, February 27, 1905.

1. **DAMAGES: Personal Injuries: Averment: Evidence.** The fact of injuries is the elemental matter and not the nature of the particular wounds and hurts which necessarily and naturally result from the negligent act and serve to create the substantive fact; and under the averment that the plaintiff "was injured in body and mind and suffered great permanent injury" evidence of particular external and internal injuries is admissible.

2. ———: ———: **General Averment.** Where there is a mere general averment of injury motion to make more definite may lie, but it is too late to raise the question of generality of the averment at the trial.

3. **PASSENGER CARRIERS: Railroad Collision: Negligence: Pleading: Burden of Proof.** Where an answer by a passenger carrier admits a collision the negligence is conceded; and

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though primarily the burden of proof rests upon the plaintiff to plead and prove negligence, the burden of proof shifts to the defendant when the collision is shown.

4. **DAMAGES: Averment: Instruction: Evidence: Earnings.** The averment was that the plaintiff "during all said time had been absolutely unable to perform any labor, and is disqualified from performing his ordinary avocations of life." Evidence of plaintiff's occupation and loss of time and earnings were admissible, and an instruction to consider "the extent, if any, to which he has been prevented and disabled by reason of said injuries from work," was proper.

5. ———: ———: ———: ———: **Medical Attention.** The averment was that plaintiff "had paid out and expended and become liable for large sums of money for medical attention." Evidence showed bills of physicians rendered and unpaid. *Held*, such amount should be included in his recoverable damages.

6. **DAMAGES: Permanent Injuries: Evidence: Experts.** The burden is upon plaintiff to show the permanent condition of his injuries and this he can do by expert evidence or by the nature of the injuries themselves.

7. ———: ———: ———: **Speculative Consequences.** Consequences which are contingent, speculative or merely possible are not to be considered and there must be such degree of probability as to amount to a reasonable certainty that injuries will be permanent before that question can be submitted to the jury.

8. ———: ———: ———: ———. Evidence reviewed and held to be insufficient to send the question of permanency to the jury.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins,* Judge.

REVERSED AND REMANDED.

McReynolds & Halliburton for appellant.

(1) The petition of plaintiff in its allegation, is not sufficient to authorize the introduction of any evidence as to the kind, character and extent of his injuries, if any. R. S. 1899, sec. 592. (2) A plaintiff must state the facts constituting his cause of action. He cannot state one and prove another, nor if he states

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none, can he supply the defect by evidence at the trial. Field v. Railway, 76 Mo. 617; Sidway v. Stock Co., 163 Mo. 172; 13 Ency. of Law and Procedure, 183; Lanitz v. King, 93 Mo. 519; Pier v. Heinrichoffen, 52 Mo. 336; State to use v. Bacon, 24 Mo. App. 406; Story v. Ins. Co., 61 Mo. App. 538; Waldhier v. Railroad, 71 Mo. 518; Gamage v. Bushnell, 1 Mo. App. 418; Kerr v. Simmons, 82 Mo. 275; Scott et al. v. Robards, 67 Mo. 289; Rush v. Brown, 101 Mo. 590; McIntosh v. Railway, 103 Mo. 131; Muth v. Railway, 87 Mo. App. 433. (3) Plaintiff's evidence of injury to his stomach and liver, should have been rejected because not pleaded. McIntosh v. Railway, 101 Mo. 134; Muth v. Railway, 87 Mo. App. 433; Magrane v. Railway, 183 Mo. 119, 81 S. W. 1158; Pinney v. Berry, 61 Mo. 366; Mellor v. Railroad, 105 Mo. 455; Coontz v. Railroad, 115 Mo. 669; Slaughter v. Railroad, 116 Mo. 269-275; Kruger v. Railway, 94 Mo. App. 458. (4) The instruction given for plaintiff was erroneous in that it authorized a recovery for things not alleged in petition, to-wit, loss of time and earnings and for medical expenses of which there was no evidence. Slaughter v. Railroad, 116 Mo. 275; Paquin v. Railroad, 90 Mo. App. 118; Boyd v. Transit Co., 108 Mo. App. 303, 83 S. W. 287; Summers v. Ins. Co., 90 Mo. App. 701; Brown v. Railroad, 80 Mo. 459. And further by authorizing a recovery for permanent injuries of which there was no evidence. (5) Under the petition in this case plaintiff was not entitled to the value of his time or what he earned or could have earned or his loss of earnings. Mellor v. Railroad, 105 Mo. 455; Coontz v. Railroad, 115 Mo. 669. (6) The allegation in plaintiff's petition that he was injured in body and mind, is not a statement of an issuable fact, but rather a legal conclusion. Rush v. Brown, 101 Mo. 590; Sidway v. Stock Co., 163 Mo. 372; Brewer v. Swartz, 94 Mo. App. 396; Leet v. Bank, 141 Mo. 582; Young v. Schofield, 132 Mo. 650. (7) The submission of the case on the single instruction for plaintiff was

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error, as no definite issue was submitted to the jury. Allen v. Transit Co., 183 Mo. 411, 81 S. W. 1146; Boyd v. Transit Co., 108 Mo. App. 303, 83 S. W. 287. (8) Plaintiff's instruction authorizing recovery for permanent injuries should have been refused for the reason that there is no evidence in the record that plaintiff was permanently injured. Schwend v. Transit Co., 105 Mo. App. 534, 80 S. W. 40; Caplin v. Transit Co., — Mo. App. —.

Howard Gray and *D. M. Roper* for respondent.

(1) The petition in this case is very much like one in the case of Brown v. Railway, 99 Mo. 310; Ins Co. v. Tribble & Pratt, 86 Mo. App. 546; Price v. Protection Co., 77 Mo. App. 236; Grace v. Nesbitt, 109 Mo. 9; Garth v. Caldwell, 72 Mo. 622; Hughes v. Carson, 90 Mo. 399; Schubach v. McDonald, 179 Mo. 163. (2) The court committed no error in permitting the plaintiff to give evidence of injury to his stomach. The evidence showed that immediately after the injury there was a mark and bruise clear across his body in the region of his stomach and that a hard cake formed at this place. Mabrey v. Road Co., 92 Mo. App. 596. (3) The court did not commit error in permitting the plaintiff to prove loss of time. Brake v. K. C., 100 Mo. App. 611; Mabrey v. Road Co., 92 Mo. App. 596; Smith v. Railroad, 119 Mo. 246; Schmitz v. Railroad, 119 Mo. 256; Gurley v. Railroad, 122 Mo. 141.

JOHNSON, J.—This is a suit for damages resulting from personal injuries. The verdict and judgment were for plaintiff. Defendant appealed. On August 12, 1903, plaintiff was a passenger upon a car propelled by electricity which defendant was running for the carriage of passengers upon its line of railroad in Jasper county. The car collided with another. Plaintiff testified that as a result thereof he was thrown violently from the car against an adjacent fence from which he rebounded to the ground.

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Over the objections of defendant the plaintiff was permitted to introduce evidence of various bodily injuries, chiefly internal, sustained from his violent projection and fall. The ground of the objections was the absence from the petition of allegations of the existence of the particular injuries which the evidence admitted at the trial tended to prove. The averment is that plaintiff "was greatly injured in body and mind and suffered great permanent injury." It is true, as urged by defendant, that all of the facts constitutive of the cause of action must be pleaded in the petition. [Sidway v. Mo. Land, etc., Co., 163 Mo. 375; Lanitz v. King, 93 Mo. 513; Pier v. Heinrichoffen, 52 Mo. 336; Leete v. Bank, 141 Mo. 581.] But defendant in making application of this rule assumes an incorrect premise. It is the *fact of injury* that is elemental, not the nature nor character of the particular wounds and hurts which necessarily and naturally result from the negligent act. They serve to create the substantive fact and are included within its bounds. Evidence of particular bodily injuries received by plaintiff in the wreck resulting from defendant's negligence was admissible under a general averment of injury to the body. [Brown v. Railroad, 99 Mo. 318; Seckinger v. Mfg. Co., 129 Mo. 590; Coontz v. Railroad, 115 Mo. 674; State ex rel. v. Bacon, 24 Mo. App. 405; Pinney v. Berry, 61 Mo. 359; Barrett v. Telegraph Co., 42 Mo. App. 542.]

It is not to be inferred defendant would not have been entitled to a more definite statement had he by proper motion sought to be informed of the nature of the injuries claimed. Without filing such motion defendant answered putting in issue the fact of any injury. In this condition of the record the objections, made for the first at the trial, came too late. [Seckinger v. Mfg. Co., supra; Grove v. Kansas City, 75 Mo. 672; Spurlock v. Railroad, 93 Mo. 530; Bowie v. Kansas City, 51 Mo. 454.]

But one instruction was asked and given on plain-

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tiff's behalf. Its scope was confined to two issues—the injury and measure of damage. Defendant insists the duty devolved upon plaintiff to cover with appropriate instructions all of the issues involved. This criticism is without merit. The answer admitted the existence of the relation of common carrier and passenger and the fact of the collision of the car upon which plaintiff was riding with another of defendant's cars. It omitted in any manner to put in issue the averment of negligence. In thus admitting the collision, negligence was conceded. In cases of this kind—injury resulting from collision—the burden primarily rests upon plaintiff to plead and prove negligence. The burden of proof shifts to the defendant when the fact of the collision is shown. [3 Thompson on Neg., sec. 2754; Allen v. Transit Co., 183 Mo. 411, 81 S. W. 1147.] Under the admissions the issues were narrowed to the injury and damage and these were fully covered by the instruction.

In this instruction the jury was directed to consider "the extent if any to which he has been prevented and disabled by reason of said injuries from working." The petition charged that plaintiff "during all said time has been absolutely unable to perform any labor and is disqualified from performing his ordinary avocations of life." Plaintiff introduced evidence of his occupation—farm labor—and over defendant's objections was also permitted to introduce evidence of loss of time and earnings. It is the rule that damages of this kind not being such as necessarily and naturally result from injury to the person, must be specially pleaded in the petition. [Mellor v. Railroad, 105 Mo. 462; Slaughter v. Railroad Co., 116 Mo. 274.] The averment, though indefinite, was sufficient to warrant the admission of evidence of loss of time and the value thereof. [Mabrey v. Gravel Road Co., 92 Mo. App. 602; Gerdes v. Iron & Foundry Co., 124 Mo. 360; Mellor v. Railroad, supra; Brake v. Kansas City, 100 Mo. App. 611; Smith v. Railroad, 119 Mo. 253; Gurley v. Railroad, 122 Mo. 151.]

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We consider Gurley v. Railroad, supra, decisive. In that case the allegation was, "that by reason of said injuries plaintiff had suffered great bodily and mental anguish, *has been unable to follow his business or perform any kind of labor.*" The right to prove loss of earnings was sustained in the case under consideration. And in Britton v. St Louis, 120 Mo. 437, under the allegation that plaintiff was incapacitated from labor "*besides loss of time*" without the direct charge of *diminished earnings,* it was held proper for plaintiff to prove such loss. These cases are apparently in conflict with Slaughter v. Railroad, and Coontz v. Railroad, supra, and ignore the rule, which until then had been observed, of admitting, under a plea of disability to labor, evidence of that fact as tending to show the *extent of the physical injury,* but not evidence to establish *facts required to be specially pleaded.* Following the decision in Gurley v. Railroad, supra, we are constrained to hold the evidence admissible.

Plaintiff's instruction also directed the consideration of "his necessary expense for medical attention in endeavoring to be cured." The petition stated that plaintiff "had paid out and expended and *become liable for* large sums of money for medical attention." Two doctors called by plaintiff to treat him for his injuries made charges for their services which they testified were reasonable and for which they rendered bills. Plaintiff was under legal obligation to pay for these services, and this liability gave him the right, notwithstanding non-payment, to include the amount thereof in his recoverable damages. [Mirrielees v. Railroad, 163 Mo. 492; Robertson v. Railroad, 152 Mo. 391; Muth v. Railroad, 87 Mo. App. 432; Murray v. Railroad, 101 Mo. 240.]

Complaint is made that the evidence is insufficient to support damages for permanent injuries. Plaintiff's instruction requires the jury to consider "whether they are permanent in their character." The verdict was for

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two thousand dollars. Plaintiff is a young man twenty-seven years of age and at the time of injury was in good health. His injuries were to the stomach and liver. According to the evidence introduced by him he suffered great pain and exhibited various symptoms of injury to these organs as the result of a severe blow or contusion. The trial occurred some three months after the injury. The following is plaintiff's testimony relating to his condition at that time:

"I am still bothered with vomiting. Yesterday I threw up every meal that I ate. For some period of time back I have averaged from one to two meals per day with the exception of a period of about two weeks when I only threw up three or four times, then it commenced again and has been keeping up ever since. It seems that there is only now and then one meal a day which don't bother me. . . . I was able to do any kind of work before my injury but since that time can do nothing that requires special strength. I can go out and hitch up my horse, or something light of that kind, but can do no lifting. . . . I remember when Doctors Ketcham and Steele came out to see me. I was on the farm about three-quarters of a mile north of where I live at the place where I got my mail. I went up for the mail several times a week; generally rode; that day I walked. . . . It was a rather windy day they were there; had been drizzling rain in the morning. I was in my shirt sleeves when they met me; the wind had turned and was coming from the north and was real chilly. . . . I told them the trouble was with my stomach; they pumped it out and found a lot of *watermelon*. . . . I had no special food of any kind prepared only of a morning at my aunt's; she generally gave me toast or something of that kind. The other meals I ate at the table with the balance. At the restaurants I had simply the ordinary meal."

Two physicians, Chester and Thomas, were witnesses for plaintiff, both of whom had treated him for

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his injuries. They were asked about the probable future results. Doctor Chester said: "Well, it might cause him permanent trouble, and again it might not." Q. "What are the probabilities if you can tell?" A. "Well, it is hard to tell what the probabilities are yet." On cross-examination: "There is no reason why the inflammation of the stomach and liver might not get well and not cause any permanent injury." Doctor Thomas said: "I saw nothing during my treatment of the man on which to base any conclusion that he would be permanently injured."

Plaintiff offered no other expert evidence relating to the permanency of his injuries. The burden was upon plaintiff to show the existence of a permanent condition of injury. This he might do either by expert evidence or by the nature of the injuries themselves. His expert evidence was against him. One doctor expressed the unqualified opinion that his injuries were not permanent; the other would not venture an opinion, saying that they might be or might not be. Both of these witnesses by reason of their profession and their treatment of the case possessed superior means of knowledge concerning his condition to that which a court or jury could receive from evidence. They saw nothing in the nature of his injuries to lead them to the conclusion that he would not recover; and yet the jury was turned into the field of conjecture to speculate and guess. The size of the verdict proclaims the result of the prognosis made.

To entitle a plaintiff to enhance his damages with compensation for future consequences resulting from the permanent condition of his injury he must perform the primary duty of showing *by evidence* the reasonable certainty of the existence of such conditions. Notwithstanding the adverse opinion of his medical experts had his injuries themselves been of such a nature as to make their permanency apparent to a person of ordinary intelligence, the plaintiff would have been entitled to have

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this fact considered by the jury as an element of damage. But in the very nature of his injuries their duration was necessarily a matter of pure guesswork.

Consequences which are contingent, speculative or merely possible are not to be considered. To justify a recovery for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. To say of a thing it is permanent means that it *will continue* regardless of contingency or fortuitous circumstance. [Schwend v. Transit Co., 105 Mo. App. 534, 80 S. W. 40; Watson on Damages for Personal Inj., sec. 302, et seq.; Joyce on Damages, sec. 244; Strohm v. Railway, 96 N. Y. 306; Smiley v. Railway, 160 Mo. 636; Gerdes v. Foundry Co., supra; Rosenkranz v. Railway, 108 Mo. 9; Chilton v. City, 143 Mo. 192; Bigelow v. Railway, 48 Mo. App. 373.]

Plaintiff under the evidence would have been entitled to have the question of future consequences considered had he properly restricted his instruction. But there was no evidence upon which to predicate the assumption that the effects of his injuries will continue to remain with him during his natural life.

Because of the failure of proof in this respect the judgment is reversed and the cause remanded. All concur.

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JOHN D. McCRILLIS, Respondent, v. SARAH A. THOMAS, Appellant.

Kansas City Court of Appeals, February 27, 1905.

1. **COVENANT FOR TITLE: Dower: Release: Effect of.** A wife's joinder in the deed of her husband is not an alienation of an estate nor the extinguishment of her inchoate right of dower, and operates only by way of estoppel in favor of the grantee in the deed alone and cannot affect her right against other parties.

2. ———: ———: **Sheriff's Deed: Limitation.** A wife's right of dower matures at her husband's death and her action is not limited by an elapse of seven years, and a sheriff's deed conveying the husband's title cannot affect her rights whether such deed if void or valid between the husband and the purchaser.

3. ———: ———: **Evidence: Record of Former Recovery: Eviction.** Where a grantor has been sued and compelled to pay damages for dower encumbrances and then sues his grantor for indemnity, the record of the former recovery is properly admitted in evidence.

4. ———: ———: ———: **Value of Land.** Such grantor's recovery must be limited by actual value of the dower interest, however much more he may have paid; and evidence of the value of the land is therefore proper.

5. ———: ———: **Damage: Costs: Notice.** A grantor's liability for the value of a dower encumbrance and the costs incurred by his grantee in defending against such encumbrance is in no wise affected by the fact that he had no notice of the former suit.

Appeal from Jasper Circuit Court.—*Hon. Hugh C. Dabbs,* Judge.

AFFIRMED.

Harding & Bright and *Brown & Crowder* for appellant.

(1) Not having been made a party, nor served with notice to appear and defend the dower suit, the defendant was not in any way affected by the judgment.

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Plaintiff, therefore, had no right to recover any part of the money paid in extinguishment of the dower interest. Walker v. Deaver, 79 Mo. 664; Leet v. Gratz, 92 Mo. App. 422; Long v. Wheeler, 84 Mo. App. 106. The record of the proceedings in Chrisman v. Allen for the recovery of the dower being *res inter alios acta,* was not admissible in the case for any purpose whatever. Walker v. Deaver, supra. (2) The court below especially erred in permitting the plaintiff to introduce testimony, against defendant's objection, touching the value of the lot in question, as the damages recoverable on breach of covenant against encumbrances, are what the plaintiff has paid to extinguish the encumbrances, if he has paid a reasonable price, without reference to the value of the land. Walker v. Deaver, supra. (3) Conceding, for the sake of argument, that the court below was justified in finding for the plaintiff (which we emphatically deny), it certainly was not justified in rendering a judgment for the plaintiff, as it did, in the sum of $957.57. According to the judgment in Chrisman v. Allen, which is all plaintiff claims to have paid in extinguishment of the dower interest, it is apparent that plaintiff was only entitled to recover about $633. (4) The deed of August 13, 1866, from Leander H. Chrisman and Ann E. Chrisman, his wife, to Adam Chrisman, operated to release the inchoate right of dower of Ann E. Chrisman, and this deed effectually barred her from asserting any dower rights to the lot in controversy. Frey v. Boylan, 23 N. J. Eq. 90; Johnson v. Van Velsor, 43 Mich. 208; Devorse v. Snyder, 60 Mo. 235; Ellis v. Kyger, 90 Mo. 600; Carter v. Walker, 2 Ohio St. 339; Elmendorf v. Lockwood, 59 N. Y. 322. (5) The judgment and proceedings in the Jasper Circuit Court against Leander H. Chrisman in the two attachment cases in favor of Jasper county are utterly void for want of jurisdiction over the property of said Chrisman. 3 Am. and Eng. Ency. L. (2 Ed.), 207; Drake on Attachments, secs. 115,116; Shinn on Attach-

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ments and Garnishments, secs. 153-154; Bank v. Garton, 40 Mo. App. 113; Hargadine v. Van Horn, 72 Mo. 370; Burnett v. McCluey, 78 Mo. 689; Norman v. Horn, 36 Mo. App. 419; Tufts v. Valkening, 122 Mo. 631; Durosetts v. Hale, 38 Mo. 346; Blodgett v. Schaffer, 94 Mo. l. c. 670. (6) Even though Ann E. Chrisman had dower in the lot in question (which we deny) the plaintiff and those under whom he claims, having been in the adverse possession of the lot for more than ten years, acquired the title of Adam Chrisman thereto. And it is entirely settled that the vendee may deny the title of his vendor, and protect himself by an adverse title acquired from another. Allen v. Moss, 27 Mo. 365.

Howard Gray for respondent.

(1) The appellant is in error in asserting that the trial court held that the judgment in the case of Chrisman v. Allen was binding upon her. The trial court made no such ruling, but respondent introduced the testimony of several witnesses to prove the value of the encumbrance and the judgment was properly admitted in evidence for the purpose of showing the eviction of Allen. The action of the court in this respect is sustained in the case of Walker v. Deaver, 79 Mo. 664. (2) Appellant complains that the court erred in permitting evidence touching the value of the lot in question. It is difficult to understand how the court would ascertain the reasonable value of an encumbrance such as a dower interest without knowing something about the value of the property. (3) The judgment was for one hundred dollars and the further sum of one hundred and ten dollars per year during the lifetime of the said Ann E. Chrisman, and the court found that in satisfying said judgment and dower interest the plaintiff had paid nine hundred and fifty-seven dollars and fifty-seven cents, and "the court finds that the amount

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paid by plaintiff was reasonable and that the value of the dower interest of said Ann E. Chrisman in said property was worth said sum." (4) Under the circumstances, said Ann E. Chrisman upon the death of her husband in 1890, was entitled to dower in the premises. Scribner on Dower, ch. 12, pars. 40, 41, 49; Kitzmiller v. Rensselaer, 10 Ohio St. 63; Littlefield v. Croker, 30 Maine 192; Taylor v. Fowler, 18 Ohio 567; Tiedeman on Real Property, sec. 127; Malloney v. Horon, 49 N. Y. Ct. App. 111; 1 Washburn on Real Property (2 Ed.), 203; Blain v. Harrison, 11 Ill. 384; Robinson v. Bates, 3 Met. 40; Bohanan v. Combs, 97 Mo. 448; Wells v. Estes, 154 Mo. 291; Needles v. Ford, 167 Mo. 495; Bradshaw v. Halpin, 180 Mo. 666, 79 S. W. 685.

JOHNSON, J.—This is an action under a covenant against encumbrance contained in a warranty deed which was executed and delivered by defendant to plaintiff on August 12, 1875, and in which certain real estate in the city of Carthage was conveyed. On June 27, 1879, plaintiff by warranty deed conveyed the same land to Charles C. Allen. In 1865 the land was levied upon under two writs of attachment issued in suits brought against Leander H. Crisman, who was then the owner thereof. These suits ripened into judgments; executions were issued, the land sold thereunder and sheriffs' deeds executed and delivered to Norris C. Hood, the purchaser. Plaintiff's grantor, the defendant, acquired title under successive conveyances from Hood. Chrisman was in possession at the time of the levy of the attachment writs. Hood took possession under the sheriffs' deeds and he and his successive grantees, including Allen, continued to hold it. Chrisman died intestate in 1890. In 1897 his widow, Ann E. Chrisman, brought suit against Allen to recover her dower interest. Shortly after service of summons Allen notified plaintiff in writing of the commencement of the action and demand that he defend the same, which

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plaintiff did. Judgment was rendered in that action in favor of Mrs. Chrisman; and on March 21, 1903, plaintiff satisfied the judgment and costs, after which he brought this action against defendant to recover the amount so expended. The judgment was for plaintiff in the sum of $957.57. Defendant appealed.

It appeared from the evidence that in 1866, after the land was seized under the attachment writs but before the sheriffs' deeds to Hood were executed, Chrisman, the defendant in those actions and the owner of the land, and his wife, Ann E. Chrisman, whose dower gave rise to this controversy, conveyed the land by warranty deed duly acknowledged by the wife to Adam Chrisman. The deed was placed of record but neither Adam Chrisman, nor any one claiming under him, ever acquired possession; nor do any of the parties to this proceeding, nor did any to the action preceding it, claim title through Adam Chrisman.

The point is made that the defendant, not being a party to the suit of Ann Chrisman against Allen, nor notified in writing to defend that action, nor in any way made privy thereto, is not bound by the judgment rendered therein and is free to interpose any defense that was open to the defendant in that suit. This position is sound and evidently was conceded by the learned trial judge. [Walker v. Deaver, 79 Mo. 678; Leet v. Gratz, 92 Mo. App. 422; Long v. Wheeler, 84 Mo. App. 101; Wheelock v. Overshiner, 110 Mo. 100.]

Defendant contends that by joining in the deed executed by her husband in 1866 to Adam Chrisman, whereby she relinquished her dower to the said grantee, Ann E. Chrisman became divested of all interest; and, therefore, when she brought suit against Allen, had no right upon which to base her action. We do not entertain this view. The inchoate right of dower which exists during coverture is not an interest in nor title to the land subject to conveyance. It may be released or relinquished; but such release does not oper-

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ate as an extinguishment except in favor of the person to whom it is given and those who claim under him. The wife's deed operates only by way of estoppel, not as the alienation of an estate. It is the release of a contingent future right. [Washburn on Real Prop., section 426; Tiedeman on Real Prop., section 127; 2 Scribner on Dower, 265; Malloney v. Horan, 49 N. Y. 118; Littlefield v. Croker, 30 Maine 192; Blain v. Harrison, 11 Ill. 384; Kitzmiller v. Rensseler, 10 Ohio S. 64; Bradshaw v. Halpin, 180 Mo. 666, 79 S. W. 685; Bohannon v. Combs, 97 Mo. 446; Wells v. Estes, 154 Mo. 297; Needles v. Ford, 167 Mo. 495.]

The deed to Adam Chrisman avails nothing to the defendant, a stranger thereto. Ann E. Chrisman, as to the parties here, was not divested of her inchoate right, nor was that right affected by the sale of her husband's estate under execution. [Davis v. Green, 102 Mo. 180.] Her right of dower matured at the death of her husband in 1890. Her action, begun in 1897 was timely, for limitations did not begin to run against her until her husband's death. [Robinson v. Ware, 94 Mo. 678.] The sheriffs' deeds to Hood were effective to convey the title of Leander H. Chrisman. Various attacks are delivered against them by defendant, none of which we deem it important to discuss for the reason that it is of no advantage to defendant to establish the invalidity of those deeds. Whether valid or void, they were without effect upon Ann E. Chrisman's inchoate right of dower. That right was vested in her when she joined her husband in the deed to Adam Chrisman; and after the delivery of that deed it remained in her against all the world *save Adam Chrisman* and *those claiming under him.*

Objection is made to the admission in evidence by the trial court of the record of the proceedings and judgment in the case of Chrisman v. Allen. But we perceive no error in this. The evidence was competent to show the legal compulsion under which plaintiff sat-

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isfied the claim of dower. An actual eviction was not required to give plaintiff a cause of action against his covenantor. The judgment against him establishing the paramount title of the widow was the legal equivalent to eviction; and his satisfaction thereof perfected his cause of action. [Walker v. Deaver, supra; Leet v. Gratz, 92 Mo. App. 422; Wheelock v. Overshiner, 110 Mo. 108.]

Nor was error committed in admitting evidence of the value of the land. As defendant urges, she was not bound by the judgment against plaintiff, although plaintiff was restricted in his recovery to the amount paid by him in satisfaction of the judgment and costs. Had the amount so paid exceeded the value of the dower interest, the amount of plaintiff's recovery would be limited to the actual value. It, therefore, was incumbent upon him to produce evidence from which such value could be ascertained. [Wheelock v. Overshiner, supra.]

The judgment was not excessive. The court found as a fact, and in this was supported by the evidence, that the amount paid by plaintiff in satisfaction of the judgment against him, including costs, was within the actual value of the dower interest. Had defendant been bound by that judgment the costs incurred and paid by plaintiff in defending the action would have been an element of his recovery. [Walker v. Deaver, supra; Hazelett v. Woodruff, 150 Mo. 546.] No good reason can be assigned for depriving him of reimbursement for these costs. Defendant is not injured in being required to pay them, included as they are within the value of the dower interest. The same logic that would exclude a recovery for them because of failure to notify defendant of the pendency of that suit would also apply to deprive plaintiff of any cause of action under the covenant in defendant's deed, for they were a part of the judgment he was compelled to pay in consequence of legiti-

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mate efforts to defend his title; and this burden was imposed upon him because of defendant's breach of covenant. The liability of defendant to him was in nowise affected by the fact that she was not notified to defend the suit against Allen. [Wheelock v. Overshiner, supra.]

Finding no error, the judgment is affirmed. All concur.

NANCY McDANIELS, Respondent, v. ROYLE MINING CO., Appellant.

Kansas City Court of Appeals, February 27, 1905.

1. **MINES AND MINING: Dependent Mother: Other Support: Statutory Construction.** Where a mother is wholly without means and formerly lives with other children, and before and at the time of her son's death is supported by him, and thereafter returns to her other children, she was a dependent on the deceased son within the meaning of section 8820, Revised Statutes 1899, and the fact that she found another to support her after his death can make no difference.

2. ———: **Caving Roof: Adjoining Mine: Conflict of Evidence: Appellate Practice.** Where there is conflict of evidence as to whether the alleged caving occurred in defendant's mine or the adjoining mine, the question is for the jury and appellate courts are bound thereby.

3. ———: **Props: Statutory Construction.** Section 8822, Revised Statutes 1899, requires the mining companies to furnish and send down into the mine sufficient supply of timber so that workmen at all times might be able to properly secure the workings from caving in. This is an imperative requirement and not a question of reasonable diligence, and on evidence extraordinary means were required for safety and timber should have been furnished to meet the requirement of the situation.

4. ———: ———: ———: **Care.** While the statute does not make the mining company an insurer it does insure the miner means to protect himself to the fullest extent; the term "properly secure" does not mean reasonably safe, but safe from danger and extraordinary care is required of the company.

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Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins,* Judge.

AFFIRMED.

Howard Gray and *Frank L. Forlow* for appellant.

Section 8820, R. S. 1899: "In case of death a right of action shall accrue to, . . . or to any person or persons who were before such loss of life dependent for support on the person killed, for a like recovery of damages." (2) Section 8822 provides that the owner, agent or operator of any mine shall keep a sufficient supply of timbers when required, to be used as props so that workmen may, at all times be able to properly secure said workings from caving in, and it shall be the duty of the owner or agent to send down all such props when desired. (3) It may be conceded, that if the defendant complied with the provisions of section 8822, then the plaintiff cannot recover in this action. Boemer v. Lead Co., 69 Mo. App. 601; Bowerman v. Mining Co., 98 Mo. App. 308. (4) It must appear by the evidence that the plaintiff was at the time of the death of her son dependent in fact upon him for support, and in this case the plaintiff's evidence does not so show. Bowerman v. Mining Co., 98 Mo. App. 315. (5) Taking out the incompetent evidence offered by plaintiff, which did not tend to show a violation of section 8822, and the evidence of plaintiff's witnesses, as well as for the defendant, shows that the defendant at no time violated that section of the statute, as was found in the Bowerman case, supra, but that the defendant with fidelity complied with the letter of the law. (6) If this verdict can stand under section 8822 and the evidence in this case then it is an impossibility for any company to comply with the provisions of that section of the statute. (7) Under the evidence of plaintiff, which was all of the evidence on this point, she was not

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actually dependent upon her son for support at the time of his death, and not entitled to substantial damages. Bowerman case, supra.

Blair, Decker & Blair and *Gardner & Cameron* for respondent.

(1) Plaintiff was dependent upon the deceased for her support and is entitled to recover. Bowerman v. Mining Co., 98 Mo. App. 308. (2) The evidence shows that defendant failed to send down into said mine a sufficient supply of timbers, and that the death of Marvin McDaniels was the result of said failure. Therefore, plaintiff is entitled to recover. Bowerman v. Mining Co., 98 Mo. App. 308; Boemer v. Lead Co., 69 Mo. App. 601.

BROADDUS, P. J.—This suit is brought under sections 8820 and 8822, Revised Statutes 1899, for damages for the death of plaintiff's son, Marvin McDaniels, who was at the time of his death about twenty years of age and unmarried.

The son was killed while in the employ of defendant as a miner in its mines near Duenwig, in Jasper county. The negligence on which plaintiff seeks to recover was the failure of defendant to furnish a sufficient supply of timbers, when required, to be used as props by the miners so that they might be able to secure the safety of the mine from caving earth; and in failing to send such timbers down into the ground; and basing her right to recover on the claim that she was dependent upon her said son for support.

There was evidence that plaintiff was sixty-four years of age, a widow and without property; that the son provided her with provisions, clothing and house rent; that he was earning $2.25 a day and devoted it to the support of his mother and himself; and that he gave her in the way of such support about $250 in the course

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of a year. The plaintiff, who was the only witness testifying as to that point, stated on cross-examination that her son had been at Duenwig about two years previous to his death, during which time he was working around the mines; that in December, before his death, plaintiff and one of her sons with his wife and infant child went to said place and rented a small house, and that deceased lived there with them, the two sons paying rent and housekeeping expenses; and that immediately after the death of her said son, Marvin, plaintiff went to Laclede county where she lived with her other children.

The mine in question was a zinc mine and it is conceded that the earth was soft and that timbers were necessary in the drifts to prevent a caving of the earth. Plaintiff's son was killed as the result of the falling of earth upon him while he was at work in said mine. But defendant contends that the caving of the earth which killed deceased did not come from defendant's mine but from that of the Red Bud mine, the two being in juxtaposition. It was shown that there was a hole in the roof of defendant's mine some ten feet above the props and that it had not been what the miners call "timbered up" to the roof at said point and wedged in securely with cord wood; that the attention of defendant's superintendent was called to the matter some time before the accident; and that dirt had been falling there, of which he had knowledge. There was further evidence tending to show that the proper way to secure earth of the nature in question was to wood or key it up to the roof, and that more timbers should have been used than were furnished; and that said superintendent was notified that more timbers were required, but they were not sent down. The defendant's evidence was strong that the caving of the earth was from the Red Bud mine, the lean of the timbers inspected after the accident indicating such to have been the fact. But witnesses, experienced miners, testified that the indications were that the cavein occurred from defendant's

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mine and was the result of the said hole in the roof being left insecure.

The jury returned a verdict for $1,500, whereupon plaintiff entered a remittitur of $500 and judgment was rendered in her favor for $1,000, from which defendant appealed. The position of appellant is that the plaintiff was not entitled to recover: first, because she did not show that she was dependent upon her said son for support; second, that the caving of the earth causing the accident came from the Red Bud mine; third, that it furnished all the timbers required for securing the safety of the miners.

Section 8820, Revised Statutes 1899, provides that, "for any injury to persons or property occasioned by a violation of article 2 on mines and mining, or a failure to comply with any of its provisions, a right of action shall accrue to the party for any direct damages sustained thereby; and in case of loss of life by reason of such violation or failure, a right of action shall accrue to the widow of the person so killed, his lineal heirs, or adopted children, or to any person or persons who were, before such loss of life, dependent upon the person or persons so killed, for a like recovery of damages." It seems clear under the evidence that before her son was killed plaintiff was dependent upon him for support as he was paying her house rent and buying her clothing and food from the time she moved to Duenwig up to the time of his death. The case is much stronger in that respect than that in Bowerman v. Mining Co., 98 Mo. App. 308, where it was held that there was sufficient evidence to send the case to the jury. Plaintiff was wholly without means and before she went to live at Duenwig she lived with and was supported by her other children; and after the death of her son, Marvin, she went back to them again for support. It seems that of all times she was dependent upon someone for support, and because she found another to support her after the death of her said son, can make no

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difference if she was dependent on him at the time of the accident.

While it may be conceded that the circumstances tended strongly to show that the caving of the earth was from the Red Bud mine, still, there was also evidence of a persuasive character that it occurred in defendant's mine. It was, therefore, a question for the jury and we are bound by their conclusions. If the accident was the result of failure upon the part of defendant to furnish a sufficient supply of timbers when required to be used as props so that the workmen might at all times have been able to properly secure the workings from caving in, it was liable and plaintiff was entitled to recover. It is conceded by respondent that props were in place at the point where the caving occurred, but that it was not sufficiently propped to make it secure. The mere fact that props were used at the place will not excuse the defendant. The statute is very comprehensive in its language and it requires that defendant should furnish and send down into the mine a sufficient supply of timber so that the workmen at all times might be able to properly secure the workings from caving in, etc.

If the caving came from the hole in the roof because it was not properly secured and which required timber and the timber was not sent down into the mine, defendant is liable. The only question before the jury as to that issue being: Was the place properly secure and did defendant send down timber sufficient to secure it? Witnesses testified that the proper manner would have been to have keyed timbers against the roof. And it seems to us that this would have been the proper way to have proceeded. Timbers so placed would have been props in the sense of the word as used in the statute. If the caving was from the hole in the roof in defendant's mine the necessity did exist for additional timbers to make it secure.

When the desired amount of timbers are furnished

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in the mine to properly secure the workings, the mineowner has performed his duty, and it is then left to the miners to use them for their own security. But they must be furnished with all the timbers necessary for that purpose, and the mineowner cannot excuse himself by furnishing what may be deemed ordinarily sufficient. This is not a question of reasonable diligence, but an imperative requirement of the statute for the preservation of the workmen engaged in hazardous labor. The condition of the roof showed that extraordinary means were required for safety and enough timbers should have been furnished to meet the requirement of the situation.

Defendant insists that if the judgment stands it results in making the mineowner an insurer for the safety of his miners. We do not think so. But the statute does insure the miner the means to protect himself to the fullest extent against cavings of the workings, leaving it to him, wisely, to use such means for his own protection. The term, "properly secure," is not used in a restrictive sense. It does not mean reasonably safe, but safe from danger; not absolutely safe, for that, perhaps, would be impossible, but such security as a reasonable and humane person, watchful of the almost constant peril to his workmen, would afford, commensurate with the impending or threatened danger. Extraordinary care is required of the mineowner. The case here is somewhat analogous in principle with that of Geismann v. Electric Co., 173 Mo. 654, and Winkelman v. Kansas City Electric Light Co., 110 Mo. App. 184.

The respondent's motion to dismiss the appeal is not well taken.

The cause is affirmed. All concur.

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PHOEBE M. HITT, Respondent, v. KANSAS CITY, Appellant.

Kansas City Court of Appeals, February 27, 1905.

1. **MUNICIPAL CORPORATIONS: Defective Sidewalk: Notice: Repair.** Where a defect in a street has existed for nearly two years the law will presume the municipality has not only had notice thereof but sufficient time to repair the same.

2. ——: ——: **Presumption: Jury.** A pedestrian ordinarily has the right to presume the street is in a reasonably safe condition, but at the same time he is required to exercise proper care which is a question for the jury.

3. ——: ——: ——: **Light.** The fact that the sidewalk is well lighted will not remove the presumption that it is safe unless the pedestrian has knowledge of the defect.

4. ——: ——: ——: **Contributory Negligence.** On the facts in the record there is no theory upon which to charge the plaintiff with negligence.

5. **DAMAGES: Permanent Injury: Conflicting Evidence: Appellate Practice.** Where there is conflicting evidence regarding the permanency of an injury the question is for the jury and not for the appellate court.

6. **APPELLATE PRACTICE: Affidavit for Appeal: Clerical Error.** Mere clerical errors are to be disregarded and an affidavit for appeal using the word "affidavit" where the word "appeal" should appear is a clerical error.

Appeal from Johnson Circuit Court.—*Hon. Wm. L. Jarrott,* Judge.

AFFIRMED.

R. J. Ingraham and *Jas. W. Garner* for appellant.

(1) Plaintiff's instruction numbered 1 does not require the jury to find that a sufficient time had elapsed before the injury (and after notice actual or construc-

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tive) for the defendant by the exercise of ordinary care to have repaired the walk where plaintiff claims to have fallen. Baker v. Independence, 106 Mo. App. 507, 81 S. W. 501; Gerber v. Kansas City, 105 Mo. App. 191, 79 S. W. 718; Richardson v. Marceline, 73 Mo. App. 360; Maus v. Springfield, 101 Mo. 613; Yocum v. Trenton, 20 Mo. App. 493; Doherty v. Kansas City, 105 Mo. App. 173, 79 S. W. 716; Quinlin v. Kansas City, 104 Mo. App. 616; Burns v. St. Joseph, 91 Mo. App. 491. (2) The court erred in telling the jury in instruction numbered 2 and also in instruction numbered 5, that the plaintiff had the right to assume the walk was in a reasonably safe condition for the use of the public. Wheat v. St. Louis, 179 Mo. 579; Hutchings v. Priestly, 61 Mich. 352; Moberly v. Railway, 98 Mo. 183; Rapp v. Railroad, 106 Mo. 428; Myers v. Kansas City, 108 Mo. 487. (3) The court erred in giving instruction numbered 7 because it authorized the jury to disregard the evidence of experts without any regard to the other evidence or circumstances in the case. State v. Witten, 100 Mo. 528; Wood v. Barber, 49 Mich. 296; Cosgrove v. Leonard, 134 Mo. 434; Stevens v. Minneapolis, 42 Minn. 136; Kansas City v. Street, 36 Mo. App. 656. (4) The damages in this case were excessive and were not justified under the evidence in the case.

Hardin & Taylor for respondent.

(1) We ask that the appeal in this case be dismissed and the cause stricken from the docket for want of jurisdiction, on account of there being no proper affidavit for appeal, as required by law. R. S. 1899, sec. 808. The statutory requirements must be strictly complied with. Railroad v. Powell, 104 Mo. App. 362; Schnabel v. Thomas, 92 Mo. App. 180; Thomas v. Ins. Co., 89 Mo. App. 12. (2) The court committed no error in giving plaintiff's instruction numbered 1. Small v. Kansas City, 185 Mo. 291. Where the instruction is set out by Judge MARSHALL and expressly ap-

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proved. (3) Appellant is unfair in its criticism of instructions numbered 2 and 5 given for plaintiff. The court did not say that the plaintiff had the right to assume the walk was reasonably safe. But in both of said instructions the jury are told that "in the absence of knowledge to the contrary" she had the right to assume that the defendant had performed its duty to the public. And the instructions are the law. Perrette v. Kansas City, 162 Mo. 238; Holloway v. Kansas City, 184 Mo. App. 19, 82 S.W. 89; Weller v. Railway, 164 Mo. 180. (4) The phrase "long time," used in instruction numbered 2 given for plaintiff, is not "an indefinite expression," as claimed by appellant. Shipley v. Bolivar, 42 Mo. App. 401; 2 Shear. & Redf., Neg., sec. 369; Franke v. St. Louis, 110 Mo. 523. "The damages in this case were excessive." They may be; but we deny that the amount awarded plaintiff is excessive. The testimony of the doctors, as in all cases, was conflicting. It was left for the jury, under appropriate instructions, to say whether plaintiff's injuries are permanent. Small v. Kansas City, 185 Mo. 291.

BROADDUS, P. J.—This suit was begun in the circuit court of Jackson county but was taken on change of venue to Johnson county. The facts on plaintiff's side were: That plaintiff while walking over a sidewalk of defendant city in March, 1902, at night, in the company of her two daughters, fell and was severely injured. The sidewalk in question was on the west side of and adjoining what is known as Convention Hall. That while she was passing along said walk she stepped into a hole which caused her to fall. It was shown that she was unacquainted with said sidewalk and that she was going along in the ordinary manner. Plaintiff's evidence was to the effect that said sidewalk was in an unsafe condition by reason of depressions and holes in the same. She testified that her foot became fastened in a hole and it had to be pulled out after she fell; and

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that she fell forward on her knees, at which time her two daughters who were with her were walking on each side of and supporting her. She is corroborated in her statement as to how she received her injury by Mrs. Taylor, one of the daughters so with her. The other daughter is since deceased.

Defendant's evidence was to the effect that the walk was composed of concrete with a top layer of asphaltum; that it was in reasonably safe condition; that there were some depressions of a saucer or dish shape; that the sides of the depressions gradually sloped toward the center; and that there were no abrupt or broken edges to those depressions. It is conceded that whatever the condition of said walk, it was the result of heat from the fire which destroyed said hall in the month of April, 1900, except that there was some evidence that steel beams from the burned building fell with their ends against the walk making holes in the same. It is not denied that whatever its condition may have been the defendant had notice of it.

The trial resulted in a verdict for the plaintiff for $5,000, of which sum she entered a remittitur of $500; whereupon judgment was rendered in her favor for $4,500, from which defendant appealed.

Objection is made to plaintiff's instruction numbered one for the reason that it does not require the jury to find that a sufficient time had elapsed after notice of the defects in the walk for defendant to have repaired same. A similar instruction was held to be error in Baker v. Independence, 106 Mo. App. 507, 81 S. W. 501; Gerber v. Kansas City, 105 Mo. App. 191; Richardson v. Marceline, 73 Mo. App. 360; Maus v. Springfield, 101 Mo. 613. There are numerous other cases in this State to the same effect. It may be conceded that in all cases where it is a question as to whether a city has had a reasonable time within which to remedy a defect in its street after notice of such defect, to repair the same before an injury resulting therefrom, an in-

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struction like the one in question would be defective. But where the defect has existed for a long time, the law presumes knowledge upon the part of the city and that it has had reasonable time within which to remedy such defect. In Small v. Kansas City, 185 Mo. 291, it is held that an instruction like the one in question under a similar state of facts was proper. In that case the defect had existed for over a year and the city's inspector had known of it for more than three months before the accident. The language of the court is: "There is no room in this case, therefore, for the application of the doctrine that the city must not only have actual or constructive notice of the defect in the sidewalk, but must also have a reasonable time within which to repair it." In this case the defect had existed for nearly two years. In such cases the law will presume that defendant had not only notice of the defect in the sidewalk, but also that it had sufficient length of time in which to repair it.

Instructions numbered two and five told the jury that plaintiff had the right to assume that the walk in question was in a reasonably safe condition for the use of the public. These instructions are criticised on the ground that the street was well lighted and that plaintiff could have discovered any defect if it existed had she exercised her senses while passing over it. There can be no denial but what the instructions state the law and that plaintiff had the right to assume that the sidewalk was reasonably safe. Yet, she was required to exercise proper care while passing over it, and if her injury was the result of want of such care she was not entitled to recover. But that was a question for the jury under the evidence and not a question for the court.

It is insisted that plaintiff had ample opportunity for knowledge of the condition of the sidewalk to have avoided the injury. If the fact that the place was well lighted is to be taken as conclusive evidence against her,

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then defendant's contention is correct; otherwise, it is not. That is all the evidence in the case that would have justified the jury in finding that the plaintiff was not in the exercise of ordinary care. If she had looked for the defect she would undoubtedly have seen it. But she was not required to do this. She had the right, in the absence of knowledge to the contrary, to feel secure, presuming that the city had performed its duty in keeping its sidewalks safe; and the fact that the place was well lighted was no evidence of itself, unsupported by any other fact, showing want of care or of negligence on her part. The cases invoked by defendant do not support its contention in that respect.

Moberly v. Railway, 98 Mo. 183, was a case where the damages claimed arose over an injury at a railroad crossing. While the court acknowledged the law to be that every one exercises ordinary care in the absence of evidence to the contrary, it did not obtain in that case because there was evidence that plaintiff failed to use ordinary care in approaching and crossing the track. In Wheat v. St. Louis, 179 Mo. 579, plaintiff insisted that his mind was so engrossed in his business that he did not think of the obstruction in the highway, or thought he had passed it. He knew of the obstruction. And the words used in the instruction, "in the absence of knowledge to the contrary" that the walk was unsafe is criticised for the same reason. In Lynch v. Railway, 112 Mo. 420, the court held that it was error to instruct the jury that the deceased had the right to presume that the mules drawing the car had bells attached to them. The evidence showed that the deceased, who was a boy, had every opportunity to know that they did not have bells attached to them. It was shown that he lived within one block of the track; that he had often been on that street; that the street was clear of obstructions at the time; that he crossed the street not over fifteen feet in front of the car; that the mules were moving at a walk; that he was not deaf; and that by the

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exercise of the slightest prudence he could have seen the car and known that there were no bells on the mules.

The case here is very different from that last noted, in that the element of knowledge of the defect in the sidewalk was wholly lacking. So far as the evidence goes, it fails, as stated, to show that plaintiff had any knowledge of the defect in the street, and in the absence of such knowledge the presumption did exist as to her that the city had performed its duty in keeping its streets in a reasonably safe condition. And in the absence of evidence that she failed to exercise due care to ascertain the unsafe condition of the walk, the presumption continued. If she had had knowledge of the condition of the sidewalk before she stepped into the hole there would have been no such presumption. But so long as it was shown that the defect was there and unknown to plaintiff she had the right to presume that it was safe.

The specific facts were that she was a resident of Saline county, had no previous knowledge of the place, and was walking along with a daughter on each side holding her arms at the time she stepped into the hole. Under such a state of facts we can conceive of no theory upon which she was chargeable with negligence. If there was any error in these instructions it was harmless, for the finding on that issue was for the right party.

The criticism of instruction numbered seven given for plaintiff is without merit. It does not say what defendant claims it to do, and for that reason we will give it no further notice. There was no error in the action of the court in refusing defendant's instruction B, as everything it contained is included in instructions numbered three and four for plaintiff.

The injury plaintiff received was in her right foot and ankle. After her injury she was taken to her home at Blackburn where she was attended by her family

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physician, Dr. Richart. At that time he found the ankle and foot and knee badly swollen and at that time he diagnosed the injury as a sprain, the foot being swollen to such an extent that he was not able to detect a bone fracture he afterwards discovered. He stated that a certain ankle bone was broken off; that he put a cast upon the limb; that a cast was still used at the time of the trial, and that she was unable to walk without its support. He further stated that the injury was permanent and that she suffered intensely, and that she would continue to suffer. And plaintiff and others testified that she was still unable to walk and that she suffered much pain.

On the other hand, medical experts testified that if there had been a fracture of the bone a perfect union had since taken place; that they could detect but little if any difference between her two ankles; that the injured ankle was slightly shrunken and slightly stiff, and upon being moved plaintiff complained of some pain; and that the condition of the ankle could be attributed to the treatment it had received at the hands of her physician. They further stated that the ankle with proper treatment would be relieved of its stiffness and pain; and that the injury was not permanent. If plantiff's case as made out is true, she was injured for life and the verdict is not excessive. If defendant's expert witnesses are to be credited she was not injured seriously and the judgment is grossly excessive. It was for the jury and not this court to say what the truth of the matter was.

Respondent contends that the appeal should be dismissed because the affidavit for such appeal does not comply with the statute. The defect consists in the affiant stating that "the affidavit prayed for by defendant," etc., using the word *affidavit* instead of the word appeal. That the statute must be strictly complied with has been consistently held by the appellate courts of this State. [Railroad v. Powell, 104 Mo. App. 362;

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Schnabel v. Thomas, 92 Mo. App. 180; Thomas v. Ins. Co., 89 Mo. App. 12.] It is our opinion, however, that the affidavit is substantially a compliance with the statute. The error was merely clerical and it is a well-established rule of law that mere clerical errors are to be disregarded.

For the reasons given the cause is affirmed. All concur.

B. W. SMALL, Respondent, v. KANSAS CITY, Appellant.

Kansas City Court of Appeals, February 27, 1905.

1. **MUNICIPAL CORPORATIONS: Defective Sidewalk: Instructions: Assuming Fact: Scienter.** An instruction is held not to contain the vice of assuming a fact and appellant errs in claiming the injured party had knowledge of the defect.

2. **——: ——: Repairs: Scienter: Instructions.** It is held that instructions are proved in the case of 185 Mo. 291.

Appeal from Johnson Circuit Court.—*Hon. Wm. L. Jarrott*, Judge.

AFFIRMED.

R. J. Ingraham, City Counselor, and *J. J. Williams* for appellant.

(1) Plaintiff's instruction numbered 5 is erroneous. Under its language, if a sidewalk became not reasonably safe, and the city failed to repair it within a reasonable time thereafter, and a person was injured by reason of such condition, the city is liable, without regard to whether a reasonable time to repair it had passed before the injury was received. That is clearly

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not the law. Baustian v. Young, 152 Mo. 317; Badgely v. St. Louis, 149 Mo. 122; Carvin v. St. Louis, 151 Mo. 334. (2) There was no evidence that the witness Hart was a sidewalk inspector of Kansas City at or before the date of the accident sued on. Therefore, it was error to incorporate and submit that question and its consequences to the jury. Lyons v. Carter, 81 Mo. App. 488; Cooper v. Mexico, 62 Mo. App. 335; Carrington v. St. Louis, 89 Mo. 208; Cook v. Anamosa, 66 Iowa 427; Mechem on Public Officers, sec. 846. (3) Plaintiff's instruction numbered 7 assumes that plaintiff's wife had no knowledge of the condition of the walk, and lays down her right to assume its reasonably safe condition in the absence of such knowledge. Wheat v. St. Louis, 179 Mo. 572; Lynch v. Railway, 112 Mo. 432. (4) The fact that she was warned of the particular hole, and the evidence of her manner of travelling at the time of the accident, given by plaintiff's own witnesses, not showing any heed to the warning, and she being the only one of the crowd to step in the hole, was some evidence of contributory negligence. Therefore, instruction numbered 7, for the plaintiff, should not have been given, and it was reversible error to give it. Schepers v. Depot Co., 126 Mo. 670; Moberly v. Railroad, 98 Mo. 183; Rapp v. Railroad, 106 Mo. 428; Myers v. Kansas City, 108 Mo. 487; Bailey v. Railway, 152 Mo. 461; Brannock v. Elmore, 114 Mo. 64; Payne v. Railway, 129 Mo. 419; Weller v. Railway, 120 Mo. 651.

Hardin & Taylor for respondent.

(1) Plaintiff's instruction numbered 5 is the same as the instruction numbered 3, given in the trial of Lutie G. Small, plaintiff's wife, against Kansas City, a case growing out of the identical facts as are in this case; the Supreme Court affirmed her case and approved the instruction. Small v. Kansas City, 185 Mo. 291. (2) Appellant is in error in asserting that "there

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is no evidence that witness Hart was a sidewalk inspector of Kansas City at or before the date of the accident sued on." Hart testifies that he was such inspector from May, 1901, to May, 1902, of the sidewalk in question. The Supreme Court also settled appellant on this contention in the Lutie G. Small case, supra. (3) It is not true that plaintiff's instruction numbered 7 assumes that plaintiff's wife had no knowledge of the condition of the walk; but the evidence fails to show that she had any such knowledge. Perrette v. Kansas City, 162 Mo. 238; Holloway v. Kansas City, 184 Mo. App. 19. (4) The fact that plaintiff was warned about a hole somewhere, at some time, did not make it incumbent upon her to go about hunting holes on a dark, foggy night, and more especially is this true, when it is remembered that appellant had wholly failed to place any street light near the hole, by which she might have been enabled to see the hole if she had found it.

ELLISON, J.—This is an action for damages to plaintiff by reason of injuries received by his wife falling on a sidewalk alleged to have been defective. The judgment in the trial court was for the plaintiff in the sum of $2,500 and defendant has appealed.

The plaintiff's wife brought her action for damages resulting to her by the fall and recovered a judgment for more than $4,500, which, being within the jurisdiction of the Supreme Court, defendant's appeal was taken there and an opinion written by Judge MARSHALL was rendered December 22, 1904, not yet reported. The present case was heard on the same evidence and so far as applicable the same instructions were given which met the approval of the Supreme Court in the wife's case.

Objection is made to plaintiff's instruction numbered seven, it being contended that the court there assumed that plaintiff's wife had no knowledge of the defective walk. We do not think defendant gives the

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instruction a fair interpretation, especially in the light of the other instructions with which it must be read and understood. Defendant conceives the instruction to be the more faulty, for the reason, as is contended, plaintiff had warned his wife of the place. This is an error of defendant's, in the sense urged. It is true the plaintiff warned his wife of the hole in the walk. That is, that there was a hole. But he did not locate it as he did not know just where it was, and for that reason fell into it himself. That he did not locate it until after his wife was hurt.

It is further urged against the judgment that plaintiff's instruction numbered five, concerning the duty to repair the sidewalk and when it should be done should not have been given. The instruction is like that in the wife's case and is approved by the Supreme Court.

So as to the sidewalk inspector. There was evidence tending to show that Hart was the sidewalk inspector for nearly nine months prior to the accident. It was not error to instruct the jury that his knowledge of the defective walk was the knowledge of the city. That question was likewise disposed of by the opinion of Judge MARSHALL.

Indeed, the case in the Supreme Court practically determines every point in this case in favor of the plaintiff.

After a full examination of the objections urged, we find we are without any legal reason for disturbing the judgment and it is affirmed. All concur.

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ADA M. ESTES, Respondent, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, February 27, 1905.

1. **PASSENGER CARRIERS: Pleading: General Averment: Making More Definite.** A petition charging the negligent acts of defendant's employees in permitting a collision is set out in the opinion and held not subject to a motion to make more specific.

2. ———: **Collision: Presumption: Negligence.** Where the evidence shows an injury resulting from a collision the presumption arises that the collision was negligent and casts the burden upon the carrier to repel such presumption and show unavoidable accident.

3. ———: **Ticket: Excursion Agent: Presumption.** Where the passenger presents a ticket issued by O, excursion agent, the only inference to indulge is that O was the carrier's agent to issue excursion tickets and cannot relieve the carrier from the careful management of its trains.

4. ———: **Collision: Evidence: Number of Casualties.** A person injured in a collision may testify, where his injuries are denied, as to the number of persons killed therein.

5. ———: **Passenger's Injury: Evidence: Complaints.** Where a passenger is injured in a collision, evidence relating to complaints made at the time is admissible.

6. ———: **Collision: Evidence: Degree of Care.** Evidence relating to negligence in permitting a collision is considered and held sufficient to support the finding of the jury, since certain precautions were not used and the carrier must use the highest degree of care to insure the passenger's safety.

7. ———: **Damages: Conflicting Evidence: Feigning Pain.** The question of the extent of a passenger's injury as also the one of his simulating pain are questions for the jury and on the facts in this case the verdict is not excessive.

8. ———: **Collision: Leaving Car: Poison Ivy: Stranger's Information.** A passenger was hurt in a collision but her car was in a fair condition, where she could have remained with safety. On information imparted by a stranger that another train was approaching she left the car and was poisoned with ivy in addition to the injuries received in the collision. *Held*, she ought not to be precluded from recovery for the injuries she sustained as a consequence, since she had a right to act on the information, though false.

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Appeal from Morgan Circuit Court.—*Hon. J. E. Hazell*, Judge.

AFFIRMED.

Wm. S. Shirk for appellant.

(1) The court erred in overruling the defendant's objection to require plaintiff to make her petition more definite and certain. In truth, a demurrer might well have been lodged against it. There can be no doubt but that it should have been made more definite and certain. Gurley v. Railway, 93 Mo. 445; 1 McQuillen, Pleading and Prac., sec. 280; Bedell v. Alexander, 8 Mo. App. 110; Gamage v. Bushell, 1 Mo. App. 418; Kerr v. Simons, 82 Mo. 275; Curren v. Railway, 86 Mo. 62; Benham v. Taylor, 66 Mo. App. 311; Wills v. Railway, 44 Mo. App. 53. (2) The demurrer to the plaintiff's evidence should have been sustained. She did not prove a single allegation of her petition except the isolated averment that two trains collided. This is not a case of *res ipsa loquitur*, and if it was, it was taken out of that class of cases by specific allegations, as to the cause of the collision, which, having been alleged, must be proved. Schneider v. Railway, 75 Mo. 295; Waldheir v. Railway, 71 Mo. 514; Fuchs v. St. Louis, 133 Mo. 197. (3) It was error to admit the Ott excursion ticket, returning coupon, etc., in evidence, for many reasons. (4) It was error to allow plaintiff to testify as to the number of persons killed in the collision. (5) It was likewise error to permit Miss Ina Jolly, Miss Effie Jolly and Mrs. Emma Ashbrook, all non-expert witnesses to testify as to what plaintiff said to them from time to time, as to her injuries, and that she suffered pain, and was suffering pain at the time of the trial. Such evidence was the merest hearsay, and self-serving statements. Railway v. Lombard, 124 Pa. St. 114; Dundas v. City, 75 Mich. 502. (6) The col-

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lision was the result of mere mischance, without negligence on defendant's part, and the jury, through prejudice, disregarded the first instruction given by the court. Under that instruction and the undisputed evidence in the case, the jury could have found but one verdict if they had not entirely ignored the instruction, or the evidence, or both. Carriers are not liable for pure accidents. Henry v. Railway, 113 Mo. 525; Harvey v. Railway, 6 Mo. App. 585; Guffey v. Railway, 53 Mo. App. 462. The presumption of negligence arising (as to passengers) from a collision between trains, is, of course, open to rebuttal by any evidence sufficient to overthrow it. Here, the uncontradicted evidence of the defendant, showing the utter absence of negligence, and the highest degree of care, overthrew such presumption. Smith v. Railway, 113 Mo. 70. (7) The verdict is grossly excessive, and evidences great prejudices, bias and sympathy on the part of the jury. That the plaintiff greatly magnified her injures is evident, even by cursory examination of the evidence.

C. C. Lawson, John D. Bohling and *Wm. Forman* for respondent.

(1) The court did not err in overruling defendant's motion to make plaintiff's petition more definite and certain. Malloy v. Railroad, 173 Mo. 75. The petition in this cause is copied after the petition of Clark v. Railroad, 127 Mo. 204; 4 Enc. of Forms Plead. and Prac., 5111. (2) The court did not err in overruling the demurrer to plaintiff's evidence. Clark v. Railroad, 127 Mo. 197; Lemon v. Chanslor, 68 Mo. 340; Furnish v. Railroad, 102 Mo. 438; Malloy v. Railroad, 173 Mo. 75; O'Connell v. Railroad, 106 Mo. 482; Waller v. Railroad, 83 Mo. 608; Jackson v. Railroad, 118 Mo. 224; Smith v. Railroad, 108 Mo. 243; Redfield on Carriers, sec. 347. (3) The court did not err in admitting the excursion ticket in evidence. McCoy v. Rail-

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road, 36 Mo. App. 452. (4) The court did not err in allowing plaintiff to testify as to the number of persons killed by the collision. (5) The court did not err in permitting Miss Ina Jolly, Miss Effie Jolly and Mrs. Emma Ashbrook to testify as to complaint and pain by plaintiff. Gross v. Railway, 50 Mo. App. 621; Squires v. Chillicothe, 89 Mo. 230; Kennard v. Barton, 25 Me. 39; Quafs v. Railroad, 48 Wis. 573; Lush v. McDaniel, 13 Iredell 485; Rogers v. Craian, 30 Texas 4; Meeker v. Railroad, 178 Mo. 173, 188. (7) If a person is placed in a situation of danger by the defendant's misconduct, and is injured in a reasonable endeavor to extricate himself, such misconduct is the proximate cause of the injury, though it proceeds more immediately, and it may be, exclusively from plaintiff's own act. Sutherland on Dam., 63; McGee v. Railroad, 92 Mo. 209; Spohn v. Railroad, 87 Mo. 74; Atkinson v. Railroad, 90 Mo. App. 489; Doane v. Railroad, 17 N. E. 913.

BROADDUS, J.—The plaintiff sues to recover damages, the result of injuries alleged to have been caused by the negligence of defendant's employees. The petition alleges that on the morning of July 12, 1903, the defendant as a common carrier of passengers undertook for hire to transport plaintiff from Kansas City to Sedalia and return; that the train upon which she was a passenger, when it reached a point between Little Blue and Lee's Summit stations, on defendant's railroad, stopped because the engine drawing said train became disabled; that about said time another of defendant's trains, known as the "Fast Mail," running from St. Louis to Kansas City, was due at the place where said train upon which plaintiff was a passenger had so stopped; "that by and through the negligence, careless and reckless acts of the agents, servants and employees of the defendant in charge of the train upon which plaintiff was a passenger, and in charge of the

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train known as the 'Fast Mail,' and in their utter disregard of the rights and safety of the plaintiff and their duty to her, carelessly, negligently, unlawfully and needlessly, and with a reckless disregard of plaintiff's rights and safety and of defendant's duty and obligation to plaintiff as its passenger, permitted said 'Fast Mail' train to strike, run into and upon and against the train upon which plaintiff was a passenger, and shattered, destroyed, demolished and wrecked the same; that plaintiff's person was caught and became entangled in said wreck and plaintiff was crushed and bruised and severely injured thereby."

The defendant filed its motion to make the petition more definite, which the court overruled. The grounds of the motion were that the allegations of the petition as to the direct and proximate cause of the collision were mere general conclusions, and that it fails to allege wherein or in what particular defendant failed to exercise diligence, or what diligence they could have exercised to have prevented the accident. The action of the court in overruling said motion is assigned as error. In support of defendant's position on the action of the court in overruling its said motion we are cited, among others, to the following authorities. In Gurley v. Railway, 93 Mo. 445, it is held: "Where the petition charges that plaintiff, who was attempting to make a crossing, was caught between two cars standing on defendant's side track by reason of its carelessness and negligence in drawing and forcing its cars together, a recovery cannot be had for negligence of the defendant in leaving cars standing on the track without securing them." That was a case where plaintiff relied on one specific charge of negligence and proved another and different act of negligence. In Kerr v. Simmons, 82 Mo. 269, the court held that neither evidence nor conclusion of law are to be stated in a pleading. But the facts should be stated to which the law is applicable.

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The other cases cited have been examined and found to have no particular reference to the question.

The defendant insists that the petition attempts to charge specific acts of negligence, but, as stated, these allegations are uncertain and indefinite. The charge of the petition is that the injury was caused by the negligent acts of defendant's employees in permitting the two trains to collide. But it does not charge any particular employee with negligence. The case is, therefore, on all fours with that of Malloy v. Railroad, 173 Mo. 75, in which the petition charged that defendant, "did by its servants in charge of said car, and its servants in charge of another car, so carelessly manage and control said cars as to cause the same to collide." The court held that the petition was good and authorized a recovery upon proof of negligence on the part of any employee of the company connected with the movement of the cars.

Defendant contends that the allegations of the petition were not proved. There was sufficient evidence that plaintiff sustained injury from the collision of the cars; and it being admitted that there was such collision, a prima facie presumption arose that the collision was caused by negligence on the part of the carrier; and the burden was cast upon the latter to repel such presumption and to show that the injury was the result of an inevitable accident, or some cause which human precaution and foresight could not have averted. [Clark v. Railway, 127 Mo. 197; Lemon v. Chanslor, 68 Mo. 340; Furnish v. Railway, 102 Mo. 438.]

The plaintiff before she embarked on defendant's passenger train bought a ticket for her passage which was issued by one, "E. C. Ott, excursion agent, Kansas City, Missouri." Are we to infer from this that the train upon which plaintiff was a passenger was in charge of said excursion agent? We think not. The only legitimate inference to indulge, in the absence of proof to the contrary, is that said Ott was defendant's agent

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for the sale of what is known as "excursion tickets." The trains in question were in charge of and operated by defendant at the time of the disaster; and there is no evidence in the record that the movements of said trains were under the direction of other than defendant. There can be no doubt but what the action of the court in overruling defendant's objection to the introduction of said ticket as evidence was right and proper.

The plaintiff was allowed, over defendant's objection, to testify as to the number of persons killed in the collision. This evidence was competent as it went to show the severity of the collision, and that was a part of plaintiff's case, as the defendant denied plaintiff's injury.

Two witnesses—Miss Effie Jolly and Mrs. Ashbrook—were permitted, against defendant's objections, to testify to complaints made from time to time of her sufferings. They stated that plaintiff complained of pain in certain parts of her body. Under the decisions of the appellate courts of this State, the evidence was competent. [Squires v. Chillicothe, 89 Mo. 226; Goss v. Railway, 50 Mo. App. l. c. 621.] And such seems to be the common law. [1 Greenleaf on Evidence, section 102.]

There are other questions raised on the appeal that are not of sufficient importance to note. As the evidence of defendant did not satisfy the jury that the collision was unavoidable by the exercise of the greatest human caution, we are not at liberty to disturb their finding. In fact, the evidence does tend to show that the collision might have been avoided had those in charge of the movements of defendant's trains exercised proper care. Defendant's train on which plaintiff was a passenger became disabled and unable to proceed when at a point between stations, the nearest of which was Lee's Summit—about two and one-half miles forward—at which point it was to go upon the sidetrack to allow the "Fast Mail" from St. Louis to pass. After

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the engine had been disabled, the engineer detached it from the train with the purpose of running to Lee's Summit; but after going some distance he found that owing to the exhaustion of steam he would not be able to reach said station before the arrival of the "Fast Mail" and he, therefore, returned with the engine to his own train. A flagman was placed at about a mile and a quarter from the train to flag the "Fast Mail" when it appeared. But the engineer of the latter train passed this flagman without seeing him. Another flagman was placed about a hundred yards in advance of the other train whom he saw; but the distance was so short that he did not have time to prevent the collision, although he made every effort possible to do so. There were no torpedoes placed upon the track as an additional precaution to give warning to the "Fast Mail," and the engineer stated that such was not the practice in such cases. Had the "Fast Mail" train been notified at Lee's Summit to stop there, as it should have been, or had torpedoes been placed upon the track at the proper points on the railroad track, the collision could have been avoided. These perhaps were extraordinary precautions, but the law requires the highest degree of care on the part of the carrier to insure the safety of the passenger.

It is urged that the verdict of the jury for $2,000, was grossly excessive; and as such it was the result of passion and prejudice. According to the evidence of the medical doctors, much of plaintiff's injury was feigned. These witnesses testified that at the time of the trial the plaintiff's ankle and the regions over her left side, of which she complained, were in a normal condition, except for some redness of the former, the result of poisonous ivy; that it was their opinion that she simulated pain. And that her left shoulder joint where she complained of pain was absolutely normal. Notwithstanding the testimony of these physicians, plaintiff complained of pain and suffering in the parts

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indicated. But our understanding of the law is that, whether or not plaintiff was simulating pain was a question for the jury and not for this court. They had a right to disbelieve the doctors and to believe the plaintiff. And if what she stated was true the verdict is not excessive.

A part of plaintiff's injury was traceable to poisonous ivy. She came in contact with the vine that communicated the poison after she had got out of the wrecked car and gone to the shade on the side of the railroad. Defendant urges that this was not the proximate result of the collision, as there was no necessity for her to leave the car. Notwithstanding it was shown that the car in which she was a passenger was not badly injured, and was a suitable place for her to remain, yet, we think the circumstances justified her in leaving it. Someone stated in her hearing that another train was approaching in the rear and that there was likely to be another collision; and with a view of anticipating further danger, she left the car and became, as stated, poisoned on her ankle. Defendant contends that she was not authorized to leave the car upon information imparted by a stranger; and that she should have waited until she received information of further danger from some employee of the defendant. This position is wholly untenable. The plaintiff having just escaped, but not without injury, from an appalling disaster, the law did not require of her such precaution; but on the contrary makes allowance for the naturally disturbed mental condition under which she was laboring and the instinct to flee from apprehended danger, whether such apprehension was well founded or not. And she ought not to be precluded from recovery for the injury she sustained as a consequence. We have been cited to no authority directly in point, and if there be none the principle is sound and this case will afford the precedent. Cause affirmed. All concur.

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By BEN ELI GUTHRIE.

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ACTION. See **Corporations, 1, 2, 3, 4; Fraudulent Conveyances, 4; Jurisdiction, 1; Landlord and Tenant, 1, 2; Maintenance, 1; Partnership, 4, 5, 8, 9; Pleading, 2, 3, 6, 9; Principal and Agent, 3; Railroads, 9; Water and Water Courses, 1, 2.**

1. **Pleading: Ordinance.** Though a petition declare on an ordinance regulating electric wires and the ordinance is not introduced in evidence, yet, if the petition after rejecting the allegations relating to the ordinance contains enough to constitute a good cause of action at common law it will support the judgment. Winkelman v. Electric Light Co., 184.

2. **Suggestion of Death: Revival: Scire Facias.** On suggestion of the plaintiff's death when the defendant does not enter his voluntary appearance, the court can only enter the suggestion and order a *scire facias* to revive the cause. Railroad v. Woodson, 208.

3. **Same: Limitation: Abatement.** Where three terms have expired since the suggestion of plaintiff's death without a *scire facias*, the action abates as to the deceased party and the interest of his representatives. Ib.

4. **Same: Attorney and Client.** When the plaintiff dies his attorney has no power to suggest his death and such suggestion is insufficient to set in motion the special limitation requiring a revivial within three terms of the court; such action must come from the administrator. Ib.

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1. **Revocation of Letters: Jury: Constitution.** The proceeding to revoke the letters of an administrator is equitable in its nature and the parties are not entitled to a jury either under the statute or the Constitution. Stevens v. Larwill, 140.

2. **Partition: Jurisdiction: Will.** Under section 4383, Revised Statutes 1899, providing that no partition of lands devised by a last will shall be made contrary to the instruction of the testator, the bringing of an action in partition in the circuit court by heirs who are disinherited by the will can not oust the probate court of jurisdiction to proceed with the administration of the estate, although it may be largely real estate. Ib.

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3. **Same: Personal Assets: Debts.** Where there are debts due by the testator and he has personal assets to be collected, the fact that the probate court has ordered into the hands of the administrator the real estate constitutes no ground for the revocation of the administrator's letters, and a partition suit in the circuit court will not oust the probate court of its jurisdiction as to personal property. Ib.

4. **———: Grant of Letters: Citation: Will.** Where persons named in the will as executors are disqualified to act, letters of administration should be granted to the persons entitled thereto but for the will; and where such persons are non-residents and therefore disqualified, no notice is necessary and the probate court may determine ex parte to whom the letters should be granted. Ib.

5. **Non-Resident: Domicile.** Evidence relating to the domicile of an administrator is considered and it is held that he was a resident of the State of Missouri within the meaning of the administration law, although he came to the State after the death of the testator and took up a residence with the view of becoming the administrator in this State. Authorities distinguished. Ib.

6. **Officers: Domicile.** An administrator is not a public officer and is not required to reside in this State one year next preceding his appointment, but it is sufficient if he be domiciled in the State at the time of his appointment. Ib.

7. **Will: Foreign Executor.** A non-resident executor of a will is not authorized to act in this State in the collection of assets or the payment of debts of the testator. Ib.

8. **Foreign Executor: Ancillary Administrator.** The fact that an estate is in process of administration in another State where the testator resided at his death will not interfere with an ancillary administration in this State as the statute requires the domestic administrator after paying such debts in this State to transmit to the foreign executor the remainder of the estate. Ib.

9. **Will: Contest: Partition: Collateral Attack.** A suit in partition can not become a contest of a will since a probated will can be only attacked in the manner prescribed in the statute and can not be assailed in a collateral proceeding. Ib.

10. **Revocation of Letters: Hostility to Heirs: Evidence.** Though the evidence shows the administrator sued one of the partitioners for rent due the estate, yet, it is held not to show such hostility as to prevent a proper management and husbanding of the estate. Ib.

11. **Same: Taking Charge of Real Estate: Collateral Matters.** Where the issue is whether or not the letters of administration should be revoked, the validity or invalidity of orders relating to the real estate and other collateral matters are immaterial. Ib.

12. **Same: Hostility of Administrator: Evidence.** On the question of an administrator's hostility to the heirs seeking the revocation of his letters, a witness should state facts and not opinions; and in this case if the excluded evidence had been admitted, yet, it would be wholly insufficient to sustain the action. Ib.

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13. **Personal Dower: Deed of Separation: Contract.** A deed of separation fully performed during the life of the husband whereby the wife relinquishes her right, title and interest in any and all property held or owned or thereafter acquired by the husband, is sufficient to defeat the wife's statutory personal dower and year's maintenance, and such contract may be enforced after the husband's death. Fisher v. Clopton, 663.

14. **Husband and Wife: Deed of Separation: Defense: Equity.** The object of a deed of separation is to divest the wife of her interest in the husband's property so that whenever and wherever she attempts to violate the contract its provisions can be interposed as a defense; and while a probate court has no equitable jurisdiction, it may entertain such a defense, especially since such courts in the allowance of demands against estates can allow equitable claims. Ib.

15. **Personal Dower: Deed of Separation: Jointure.** A deed of separation is different from a settlement or jointure and the wife need not in express terms renounce dower or other interests in her husband's property, and while she may renounce the provisions of a postnuptial jointure and take her statutory dower, such right does not exist in a contract for separation. Ib.

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1. **Award: Reconsideration.** When arbitrators in pursuance of the submission have made, signed and delivered their award, their authority is at an end and they cannot reopen the case and make a fresh award without consent of both parties. Brown and Moore v. Durham, 424.

2. **Same: Evidence.** And evidence is inadmissible on a motion to confirm the award for the purpose of explaining the action of the arbitrators in reconsidering the first and making a second award. Ib.

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1. **Forgery: Principal and Agent: Indorsement of Check.** A bank buying a check has no right to believe the indorsement of the payee genuine because witnessed by drawer's agent, where the agent in witnessing it is not in the line of his duty as agent. Bank v. Insurance Co., 62.

2. **Same: Indorsement of Check.** Before purchasing a check a bank must know payee's indorsement to be genuine, since without such indorsement there is no privity of contract between the drawer and the drawee. Ib.

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3. **Same: Principal and Agent.** A principal is not liable for the forgery of his agent especially when acting without the scope of his authority. Ib.

BENEFIT SOCIETIES.

1. **Conflict of Laws: Iowa and Missouri Statutes.** Where in construing the policy of a benefit society organized under the laws of Iowa it is found that the laws of that State and this State are different, the Missouri statute controls. Herzberg v. Brotherhood, 328.

2. **Same: Legal Representatives.** A certificate of a benefit society determines whether it operates under the assessment statute or under the general insurance law, and where it is made payable to the legal representative it is without the protection of the assessment statute since such payment would send the money to the general estate and so frequently entirely divert it from those the Missouri statute directs shall be the beneficiaries. Ib.

3. **Same.** Nor can the fact that the society calls itself fraternal or that the Secretary of State issued a statutory permission to do business as such, affect the matter. Ib.

BILLS AND NOTES. **See Insurance, 1, 2; Limitations, 1, 2; Principal and Surety, 2.**

1. **Evidence: Varying Contract.** No contemporaneous verbal agreement adding to or varying a written contract can in any manner affect such contract except in cases of fraud, accident or mistake. Poindexter v. McDowell, 233.

2. **Contemporaneous Agreement: Reading.** The fact that one signed a note supposing the same to be paid in a certain manner is not such mistake as to excuse him, since he is presumed to have read the note. Ib.

3. **Same: Fraud.** Where an assured gives his note for the premium with the agreement that the insurer would loan him five thousand dollars to lift certain mortgages and pay the note, the failure to make the loan does not constitute a fraud in procuring the note. Ib.

4. **Defense: Peremptory Instruction: Trial Practice.** Where the defendant fails in his defense against his note it is the duty of the trial court to peremptorily instruct the jury in favor of the plaintiff. Ib.

5. **Fraud: Instruction: Burden of Proof.** When the maker of a note introduces evidence tending to prove fraud in its inception, the burden to show clean hands devolves upon the purchaser, and an instruction requiring the maker to show the existence of such fraud and plaintiff's knowledge thereof is condemned. Stewart v. Andes, 243.

6. **Same: Covering Whole Case.** Instructions given for both parties constitute the court's charge and are to be considered as one instruction, and, if harmonious, it is immaterial that one taken by itself fails to embrace all the essential elements of the case; but where an instruction assuming to cover the whole case peremptorily directs a verdict without regard to an important issue, such as fraud in the inception of the note, it is bad, since out of harmony to the other law given. Ib.

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7. **Same: Evidence: Facts and Circumstances: Scienter.** The actual knowledge by the holder of a note of the payee's fraud may be shown by circumstantial evidence, and facts and circumstances that would put a prudent man on inquiry may be admitted as tending to show actual knowledge. Ib.

BRIBERY.

1. **Common Law: Legislator.** It was an offense at common law to bride or attempt to bribe a legislative officer. State v. Sullivan, 75.

2. **Same: Solicitation of: Common Law: Misdemeanor.** While there is no statute on the subject, yet to solicit a bribe is a misdemeanor under the common law in force in this State. Ib.

3. **Common Law: Felony: Misdemeanor.** At common law to bribe a judicial officer is a felony, but it is in doubt whether it was a felony or misdemeanor to bribe other officers. Ib.

4. **Solicitation of: Common Law: Misdemeanor.** Any unlawful step necessary or useful towards committing a misdemeanor when willfully taken, is a misdemeanor; and the soliciting of a bribe is a step—an act, and not a mere desire—toward the commission of an offense, and, therefore, is a misdemeanor. Ib.

5. **Same: Felony: Misdemeanor.** To accept a bribe is a felony under the statute of Missouri, and to solicit the commission of a felony is at common law a misdemeanor; in this State the statute makes it a felony to bribe a legislative officer, and a senator who solicits a bribe commits a common-law misdemeanor. Ib.

6. **Evidence.** The evidence relating to the solicitation of a bribe by a State senator is considered and held sufficient to send the question to the jury and to support a verdict of guilty. Ib.

BROKERS.

1. **Real Estate Broker: Commission: Evidence: Jury.** Where a real estate broker produces a purchaser ready, able and willing to consummate a sale he has earned his commission; and on review of evidence showing a somewhat unusual manner of collecting the commission so that the vendee assumes the same, without understanding the object thereof, it is held sufficient to send the question of the vendee's assumption to the jury, though the sale in fact did not occur by reason of the vendor's default. Curry v. Whitmore, 204.

2. **Same: Homestead: Failure to Complete.** The fact that the land sold is a homestead and the wife refuses to join in the deed, will not relieve the landowner from liability to pay the commission when earned by the broker. Ib.

3. **Real Estate Broker: Commission: Assignment: Splitting Demand.** Plaintiff, a real estate broker, told another broker of his contract with a landowner and promised such broker one-half of the commission if he would secure a proper purchaser, which he did. *Held*, this was not an assignment of a part of the plaintiff's cause of action so as to split the demand. Bray v. Riggs, 630.

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4. **Real Estate Broker: Commission: When Earned.** Where a broker produces to the landowner a purchaser ready and willing and enters into an enforcible contract to purchase, the broker has earned his commission and the fact that the sale is not consummated because defendant is unable to perform cannot affect the broker's right to recover his commission. Perrin v. Kimberlin, 661.

CHAMPERTY. See **Maintenance, 1.**

COMMISSIONS. See **Broker, 1, 3, 4.**

COMMON CARRIERS.

1. **Platform: Light.** A carrier of passengers discharging them at night on a platform should have the same lighted so they can proceed with safety by the exercise of care along the usual course taken by passengers. Gerhart v. Railroad, 105.

2. **Same: Special Train.** The fact that the train may be a special one or the hour of arrival unusual, can not excuse the carrier nor lessen its obligation. Ib.

3. **Same: Instructions.** Certain instructions are considered and approved. Ib.

4. **Passenger: Alighting from Train: Demurrer to Evidence: Jury.** Though the preponderance of the evidence relating to the alighting from a moving train be largely with the defendant, yet the court can not give a peremptory instruction if there is substantial evidence supporting plaintiff's theory of the case, and this though the plaintiff may have contradicted himself in his testimony on the issue, since it is for the jury to say which of the two statements they will believe. Bond v. Railroad, 131.

5. **Same: Jury Question: Negligence.** It is not negligence *per se* for a passenger to attempt to board or alight from a slowly moving car; and whether, under the circumstances of the given case, it is negligence is for the jury. Ib.

6. **Same: Pleading: Variance: Instruction.** A petition counted on the negligence of the defendant in suddenly starting its train while plaintiff was in the act of alighting therefrom. An instruction that if he attempted to alight from a slowly moving train he could not recover should have been given. Ib.

7. **Same: Verdict: Passion and Prejudice: Appellate Practice.** The appellate court will not set aside a verdict unless it is so clearly against the weight of the evidence that it must have been the result of passion and prejudice, though the trial court may in its discretion set aside a verdict when it believes the jury has abused its discretion in passing on the credibility of the witnesses and the weight of the evidence. Ib.

8. **Passenger Alighting from Train: Contributory Negligence: Demurrer to Evidence.** Where a lady passenger sixty-three years of age, weighing two hundred pounds, alights from a train moving five or six miles an hour, she is guilty of contributory negligence precluding a recovery for injuries sustained. Hecker v. Railway, 162.

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9. **Same: Pleading: Variance.** Broaddus, J., in a separate opinion: The petition avers that after stopping at the station, and while plaintiff was in the act of alighting, the train was suddenly put in motion, causing the passenger to be thrown, etc. Evidence showed an attempt to alight from the train while in motion. *Held*, a fatal variance. Ib.

10. **Passenger: Negligence: Pleading: Evidence: Variance: Appellate Practice.** The appellate court cannot determine which of two statements of plaintiff is to be taken as her evidence, and on the evidence and pleading summarized in the opinion it is held there is not such variance as to preclude a recovery. Bartley v. Railway, 148 Mo. 124, distinguished. Lehner v. Railroad, 215.

11. **Same: Starting Car.** Street railways as other carriers must exercise toward passengers the utmost care of a very cautious person and should not start their cars before a passenger has a reasonable time to get off or on. Ib.

12. **Passenger: Who, Passenger and When: Car: Privilege.** A person, though intending to become a passenger, who uses a station for a lounging room without the expectation of the arrival of a train, cannot claim the high degree of care extended to a passenger; and where a person uses a merely permissive privilege optional with the user, such as occupying a car on a side track, the duty due to such person is no other than the duty one owes to another who may come upon his premises by express or implied invitation. Archer v. Railroad, 349.

13. **Passenger: Negligence: Use of Premises: Invitation: Evidence.** Plaintiff was one of a company using a hired car for a going and a returning trip. This car warmed and lighted stood on a side track at the returning terminus with permission to members of the party to use the same between its arrival and departure. The evidence relating to plaintiff's injury while returning to the car in the interval is considered and held insufficient to support an action, since plaintiff was at the time not a passenger and the defendant was not guilty of negligence regarding the defect in a frog in its track, and the plaintiff was guilty of contributory negligence in leaving a smooth path to cross the track in a hurry to get in the car. Ib.

14. **Street Railways: Boarding Moving Car: Contributory Negligence.** Some of the points on the question of contributory negligence in this case were determined on the former appeal, as the case is found reported in 106 Mo. App. 329, 80 S. W. 273. Leu v. St. Louis Transit Co., 458.

15. **Same.** Whether a passenger, who, attempting to board a car moving slowly, was thrown off by the sudden acceleration of speed, was guilty of contributory negligence, in holding on to the car too long, when if he had let go immediately he would have escaped injury, was a question for the jury. Ib.

16. **Same: Falling Voluntarily.** An expression by one of plaintiff's witnesses in his testimony that plaintiff "decided to fall," could not be made a basis for nonsuiting the plaintiff on the ground that he fell voluntarily, when it is evident from the context that the witness meant the plaintiff saw his struggle to get in the car would be futile and he would be less likely to suffer injury from falling than from being dragged further. Ib.

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17. **Passenger: Railroad Collision: Negligence: Pleading: Burden of Proof.** Where an answer by a passenger carrier admits a collision the negligence is conceded; and though primarily the burden of proof rests upon the plaintiff to plead and prove negligence, the burden of proof shifts to the defendant when the collision is shown. Wilbur v. Railway Co., 689.

18. **Passenger: Pleading: General Averment: Making More Definite.** A petition charging the negligent acts of defendant's employees in permitting a collision is set out in the opinion and held not subject to a motion to make more specific. Estes v. Railway Co., 725.

19. **Collision: Presumption: Negligence.** Where the evidence shows an inquiry resulting from a collision the presumption arises that the collision was negligent and casts the burden upon the carrier to repel such presumption and show unavoidable accident. Ib.

20. **Ticket: Excursion Agent: Presumption.** Where the passenger presents a ticket issued by O, excursion agent, the only inference to indulge is that O was the carrier's agent to issue excursion tickets and cannot relieve the carrier from the careful management of its trains. Ib.

21. **Collision: Evidence: Number of Casualties.** A person injured in a collision may testify, where his injuries are denied, as to the number of persons killed therein. Ib.

22. ———**: Passenger's Injury: Evidence: Complaints.** Where a passenger is injured in a collision, evidence relating to complaints made at the time is admissible. Ib.

23. ———**: Collision: Evidence: Degree of Care.** Evidence relating to negligence in permitting a collision is considered and held sufficient to support the finding of the jury, since certain precautions were not used and the carrier must use the highest degree of care to insure the passenger's safety. Ib.

24. **Damages: Conflicting Evidence: Feigning Pain.** The question of the extent of a passenger's injury as also the one of his simulating pain are questions for the jury and on the facts in this case the verdict is not excessive. Ib.

25. **Collision: Leaving Car: Poison Ivy: Stranger's Information.** A passenger was hurt in a collision but her car was in a fair condition, where she could have remained with safety. On information imparted by a stranger that another train was approaching she left the car and was poisoned with ivy in addition to the injuries received in the collision. *Held*, she ought not to be precluded from recovery for the injuries she sustained as a consequence, since she had a right to act on the information, though false. Ib.

COMMON LAW. See **Bribery, 1, 2, 3, 4, 5; Equity, 3; Slander, 2.**

CONDEMNATION.

1. **Mortgagees: Marshalling Assets: Interest.** A prior mortgagee is entitled to priority of payment including interest after judgment of condemnation until payment out of the fund awarded as damages as a condemnation proceeding against the mortgaged land. Kansas City v. Trust Co., 647.

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2. **Same: Kansas City Charter: Appeal.** The provisions of the Kansas City charter suspending the judgment in case of appeal and interest pending the appeal relates only to the landowner and cannot affect the rights of the prior mortgagee to have his interest between the date of the judgment and its affirmance on appeal. Ib.

CONSIDERATION. See **Fraudulent Conveyances**, 4; **Insurance**, 3, 14; **Payment**, 1; **Principal and Surety**, 2.

CONSTITUTION. See **Courts**, 1, 2.

CONSTRUCTION. See **Benefit Societies**, 1, 2, 3; **Condemnation**, 1, 2; **Corporation**, 6; **Courts**, 1, 2; **Evidence**, 7; **Fences and Inclosures**, 3; **Indictment**, 3, 4, 5; **Insurance**, 7, 9, 10, 11, 12, 13; **Landlord and Tenant**, 3; **Mechanics' Liens**, 3; **Mines and Mining**, 1, 3, 4; **Municipal Corporations**, 1, 5; **Pleading**, 9; **Railroads**, 9, 12; **Set-off**, 1, 2, 3.

CONTRACTS. See **Administration**, 13; **Corporations**, 4; **Evidence**, 12, 13.

1. **Evidence: Verdict.** A promise or contract need not be evidenced by precise words or any particular formula of expression, but circumstances and reasonable inferences therefrom may be sufficient to sustain a verdict. Stobie v. Earp, 73.

2. **Same: Instructions.** Instructions relating to the existence of a contract are sufficient to sustain the verdict. Ib.

CORPORATIONS. See **Gaming**, 1, 2, 3.

1. **Partnership: Evidence.** Though a corporation may not without special charter authority become a member of a partnership, yet, on the facts in this case the plaintiff has done so and there is no legal impediment to such action. Hardware Co. v. Meyer, 14.

2. **Same: Action.** One partner can not sue another at law, and where he pays more than his proportion he must resort to equity for an accounting. Ib.

3. **Same: Guarantor: Money Had and Received.** Where a corporation guarantees the bills of a partnership it can not sue the partnership for money had and received, but must seek its remedy in some other form of action. Ib.

4. **Same: Contract: Money Had and Received.** Where the agent of a corporation misappropriates its funds to pay the debt of a partnership of which he is the manager, without the knowledge of his copartners, the partnership can not be made to refund such money, as there is no contractual relation between the corporation and the partnership. Ib.

5. **Non-Trading: Partner's Authority.** The manager of a non-trading partnership has no authority to borrow money, and the fact that his copartners may know that he is using more money than has been paid into the firm will not make the partnership liable to a corporation from which the money was taken. Ib.

6. **Transfer of Stock: By-Laws: Statutory Construction.** Section 965, Revised Statutes 1899, referring to transfer of stock nor

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by-laws made in pursuance thereof were intended to prevent the alienation of the corporation stock, but merely to enable the company to deal with intelligence with its stockholders; such stock being personal property, can be sold and its transfer on the books of the company be compelled by the courts. Crenshaw v. Mining Co., 355.

7. **Dividends: Debts.** A judgment for the right party awarding certain dividends of stock will not be interfered with on the ground of the possibility of debts due by the corporation, especially where the plaintiff is solvent. Ib.

COSTS. See **Covenant for Title, 5; Pleading, 7.**

COUNTERCLAIM. See **Pleading, 9; Sales, 12; Set-off, 1, 2, 3.**

COURTS. See **Evidence, 14.**

1. **Circuit Court: Each County a Separate Court.** Under sections 22, 23, 24 and 29 of the Constitution of Missouri, the circuit court is not one court for an entire circuit composed of several counties, but is a separate and distinct court for each county in which a circuit judge sits. State v. Pope, 520.

2. **Same: Two Courts in the Same Circuit at the Same Time.** Under sections 2597 and 2598 of the Revised Statutes of 1899, an adjourned term of a circuit court may be held in one county of a circuit by a judge called in from another circuit, although the regular judge may be holding a regular term of court in another county at the same time.

COURTS OF APPEALS. See **Jurisdiction, 2.**

COVENANTS FOR TITLE.

1. **Dower: Release: Effect of.** A wife's joinder in the deed of her husband is not an alienation of an estate nor the extinguishment of her inchoate right of dower, and operates only by way of estoppel in favor of the grantee in the deed alone and cannot affect her right against other parties. McCrillis v. Thomas, 699.

2. **Same: Sheriff's Deed: Limitation.** A wife's right of dower matures at her husband's death and her action is not limited by an lapse of seven years, and a sheriff's deed conveying the husband's title cannot affect her rights whether such deed is void or valid between the husband and the purchaser. Ib.

3. **Same: Evidence: Record of Former Recovery: Eviction.** Where a grantor has been sued and compelled to pay damages for dower encumbrances and then sues his grantor for indemnity, the record of the former recovery is properly admitted in evidence. Ib.

4. **Same: Value of Land.** Such grantor's recovery must be limited by actual value of the dower interest, however much more he may have paid; and evidence of the value of the land is therefore proper. Ib.

5. **Same: Damage: Costs: Notice.** A grantor's liability for the value of a dower encumbrance and the costs incurred by his grantee in defending against such encumbrance is in nowise affected by the fact that he had no notice of the former suit. Ib.

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CRIMINAL LAW. See **Bribery; Dramshops, 1, 2, 3, 4; Fences and Inclosures, 3; Indictment.**

DAMAGES. See **Common Carriers, 24, 25; Covenant for Title, 5; Evidence, 2, 3, 4, 5, 6, 7; Injunction, 1; Master and Servant, 18; Sales, 11.**

1. **Loss of Earnings: Pleading.** Held, that both the allegation and proof in the record are sufficient to support a recovery of lost earnings. Zongker v. Mercantile Co., 382.

2. **Personal Injury: Permanency; Evidence.** *Held*, direct evidence was sufficient to send to the jury the question of the permanency of plaintiff's injuries without resorting to expert testimony. Ballard v. Kansas City, 391.

3. **Same: Reasonable Certainty: Interpretation of Evidence.** Before a claim for permanent injury can go to the jury there should be evidence tending to prove such injury to a reasonable certainty but not to an absolute certainty; and the expression "in all likelihood" used by an expert witness should be treated as equivalent of reasonable certainty, since in the interpretation of the language employed by witnesses the main object is not to draw fine distinctions based on accurate definitions of words, but to ascertain the real idea intended to be expressed. Ib.

4. **Same: Instruction.** The expression "may have suffered" in an instruction is descriptive of completed action and equivalent to "has suffered," and is not subject to the objection that it licenses the jury to reveal in mere probabilities, but is confined to the investigation of an existing fact. Ib.

5. **Same.** Where there was a conflict in the evidence as to the permanency of plaintiff's injury, and the jury was free to reject such claim entirely, an instruction authorizing a recovery for such bodily pain and mental anguish as plaintiff "may suffer by reason of her injury in the future, if any," was erroneous, as not limited to the bounds of "reasonable probability." Ib.

6. **Ejection of Train Porter: Notice.** In an action by a train porter against a railroad company for damages on account of injuries received in being ejected by the company's watchman, from a car in which he was sleeping at a terminal station, evidence that he and other porters had slept in the cars at the terminal stations for five years and that the company had issued an order forbidding them to do so, was sufficient to submit to the jury the question as to whether the company had knowledge of, and had consented to his sleeping in the car. Howard v. Railroad, 574.

7. **Same.** If the plaintiff in such a case had been sleeping in the car at terminal points for a long time, with the implied permission of the railroad company, he could not be rightfully ejected from the car unless he had received proper notice that an order had been issued forbidding it. Ib.

8. **Injury to Nervous System.** Where plaintiff, in an action for personal injuries, testified that he was much affected, short winded, had severe pain in his breast in inclement weather, was not steady in his nerves, lisped when talking, was sufficient to authorize the jury to consider whether the plaintiff's nervous system had been injured. Ib.

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9. ———: **Personal Injuries: Medical Attendance.** In an action for personal injuries, an instruction authorizing the jury to take into consideration the amount paid out for medical attendance, is error in the absence of evidence that the plaintiff had paid any expenses incurred in medical attendance. Ib.

10. **Petition: Evidence: Instructions.** An instruction should in no case go beyond the petition enumerating the elements of damage, nor should it go so far unless the evidence supports the allegations therein. St. Louis v. Kansas City, 653.

11. **Evidence: Experts: Instruction.** A defendant may be entitled to an instruction that while the jury is not bound to accept the testimony of experts, yet, it had no right to disregard such testimony merely for the reason that it was given by experts, and such instruction is held improperly refused. Ib.

12. **Personal Injuries: Averment: Evidence.** The fact of injuries is the elemental matter and not the nature of the particular wounds and hurts which necessarily and naturally result from the negligent act and serve to create the substantive fact; and under the averment that the plaintiff "was injured in body and mind and suffered great permanent injury" evidence of particular external and internal injuries is admissible. Wilbur v. Railway Co., 689.

13. **Same: General Averment.** Where there is a mere general averment of injury, motion to make more definite may lie, but it is too late to raise the question of generality of the averment at the trial. Ib.

14. **Averment: Instruction: Evidence: Earnings.** The averment was that the plaintiff "during all said time had been absolutely unable to perform any labor, and is disqualified from performing his ordinary avocations of life." Evidence of plaintiff's occupation and loss of time and earnings were admissible, and an instruction to consider "the extent, if any, to which he has been prevented and disabled by reason of said injuries from work," was proper. Ib.

15. **Same: Medical Attention.** The averment was that plaintiff "had paid out and expended and become liable for large sums of money for medical attention." Evidence showed bills of physicians rendered and unpaid. *Held*, such amount should be included in his recoverable damages. Ib.

16. **Permanent Injuries: Evidence: Experts.** The burden is upon plaintiff to show the permanent condition of his injuries and this he can do by expert evidence or by the nature of the injuries themselves. Ib.

17. **Same: Speculative Consequences.** Consequences which are contingent, speculative or merely possible are not to be considered and there must be such degree of probability as to amount to a reasonable certainty that injuries will be permanent before that question can be submitted to the jury. Ib.

18. **Same.** Evidence reviewed and held to be insufficient to send the question of permanency to the jury. Ib.

19. **Permanent Injury: Conflicting Evidence: Appellate Practice.** Where there is conflicting evidence regarding the permanency of an injury the question is for the jury and not for the appellate court. Hitt v. Kansas City, 713.

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DEBTOR AND CREDITOR. See **Fraudulent Conveyances, 2.**

DEEDS. See **Administration,** 13, 15; **Covenant for Title,** 2; **Equity,** 1, 2; **Evidence,** 11; **Pleading,** 1.

1. **Reformation: Railroad Crossing: Wagon Pass.** Evidence in a suit to reform a deed and correct a mutual mistake is considered and held sufficient to show that the expression "cattle or wagon pass" used in the deed was intended to mean not a crossing but an underway twelve feet wide and ten feet high. Owens v. Railroad, 320.

DEFINITIONS. See **Insurance,** 10, 11, 12, 13; **Mines and Mining,** 4.

DEFENSE. See **Administration,** 13; **Bills and Notes,** 4; **Insurance; Landlord and Tenant,** 1; **Maintenance,** 3; **Pleading,** 9; **Set-off,** 1, 2, 3; **Water and Water Courses,** 1, 2, 3.

DOMICILE. See **Administration,** 5, 6.

DOWER. See **Administration,** 13, 15; **Covenant for Title,** 1, 2, 3, 4, 5.

DRAMSHOPS. See **Indictment,** 1, 2.

1. **License: Admissions.** In a prosecution of a dramshop-keeper for the violation of the provisions of the dramshop act, the admission of the defendant, on the trial of the case before the justice of the peace, that he had a license, was competent evidence and sufficient to show that he was a licensed dramshop-keeper. State v. Barnett, 584.

2. **Music in Dramshop.** Where the building in which a dramshop was kept was partitioned off ito separate rooms, one of which was used for a barroom and another used in connection with the barroom as a sitting room with an opening between, the suffering of musical instruments to be played in the sitting room was a violation of sections 3018 of the Revised Statutes of 1899. Ib.

3. **Dramshop-keeper: Information.** Under the definition of a dramshop-keeper in section 2990 of the Revised Statutes of 1899, an information charging a dramshop-keeper with keeping his dramshop open on Sunday, in violation of section 3011, is sufficient to support a conviction, although the word "licensed" is omitted from the information. State v. Barnett, 592.

4. **License: Record of County Court.** In a prosecution of a dramshop-keeper fôr keeping his dramshop open on Sunday, the record of the county court granting the license to him is conclusive evidence that the license was granted, but is not evidence that the license was issued or delivered. Ib.

5. **Same: Secondary Evidence.** The testimony of the county clerk that he issued the license, and his official memorandum containing a list of the licenses issued, are incompetent to prove the issuance and delivery of the license, in the absence of evidence showing that notice was given to the defendant to produce his license and a foundation thus laid for the introduction of secondary evidence. Ib.

ELECTRICITY. See **Action,** 1.

1. **Electric Wires: Negligence: Insulation: Degree of Care.** Persons maintaining electric wires must use the utmost care

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to insulate them thoroughly and keep them so and an instruction to this effect is approved. Winkelman v. Electric Light Co., 184.

2. **Same: Injury** And the fact that one coming in contact with such wires is injured is conclusive evidence of imperfect insulation and therefore of negligence. Ib.

3. **Same: Sudden Break.** In regard to what would be the effect of a sudden break followed by injury before the owner learned thereof or could repair the same is not decided. Ib.

4. **Same: Contributory Negligence.** Where the injured party is guilty of contributory negligence there is no liability. Ib.

EQUITY. See **Fraudulent Conveyances**, 8; **Partnership**, 5, 8, 9; **Principal and Surety**, 1.

1. **Reformation: Specific Performance: Building Contract: Railroad Crossing.** Cases relating to refusing to grant specific performance in ordinary cases of building contracts are distinguished, since this is action to enforce specific performance of a contract whereby defendant agreed to do certain work for the benefit of plaintiff on its own premises, and which could not be done by another. Owens v. Railroad, 320.

2. **Reformation: Specific Performance: Damages: Misjoinder: Trial and Appellate Practice.** Objection to the improper misjoinder in the same count of actions to reform a deed and enforce specific performance of a contract therein contained, and for damages for non-performance must be made in the trial court and cannot be considered for the first time in the appellate court. Ib.

3. **Perpetuation of Testimony: Statute: Common Law.** A petition seeking to the establishment as evidence in a pending dower action of a certain deposition of a deceased person, given in an action between others, is held not to be a proceeding within the statute for the perpetuation of testimony, nor in equity, since any remedy legal or equitable having for its object the perpetuation of testimony is confined to the testimony of witnesses in being; and said petition set out in the opinion does not state a cause of action. Morris v. Parry, 675.

4. **Aiding Law: Invading Legal Rights: Evidence.** However far-reaching and puissant the arm of equity, it only supplements and aids the law but does not invade its domain and never works to the destruction of legal rights or in opposition thereto; and will not attempt to force the admission of incompetent testimony at the trial of a dower suit. Ib.

5. **Laches: Perpetuation of Testimony.** A lapse of ten years after the intention of the plaintiff to assert dower in certain lands in event she survived her husband became known without any steps to establish his title or bar the inchoate dower right or perpetuate testimony establishing his title, constitutes laches and the claim becomes too stale to afford equity in claimant's favor. Ib.

ESTOPPEL. See **Fraudulent Conveyances**, 3; **Insurance**, 6, 14; **Limitations**, 3, 5; **Practice, Trial**, 6.

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EVIDENCE. See Administration, 10, 12; Arbitration and Award, 2; Bills and Notes, 1, 7; Bribery, 6; Contracts, 1; Covenant for Title, 3, 4; Damages, 11, 16; Dramshops, 3, 4, 5; Fences and Inclosures, 1; Fraudulent Conveyances, 6; Injunction, 3; Justices' Courts, 3; Master and Servant, 7; Mechanics' Liens, 2; Practice, Trial, 11; Principal and Agent, 2; Railroads, 4, 10; Sales, 9; Taxbills, 9.

1. **Abstract: Lease: Appellate Practice.** Where a lease is not set out in the abstract for the reason that it is not in power or possession of the appellant, the appellate court cannot reiew the action of the trial court in refusing to admit it in evidence. Rieger v. Welles, 166.

2. **Personal Injury: Pleading: General Averment: Particular Acts.** A petition for personal injury alleged that the bones of the foot were broken and the ligaments torn, confining the plaintiff to her room with great pain and permanent disability of the foot attended with expense, etc. *Held*, that evidence of a malignant growth on the foot and the subsequent amputation thereof could not be shown in evidence as elements of damage. Arnold v. Maryville, 254.

3. **Same: Subsequent Amputation.** Under the averments of the petition it could be shown that the injuries specifically charged continued down to the time of the trial and were permanent, but evidence of amputation subsequent to the institution of the action is inadmissible. Ib.

4. **Same.** Under a general averment of injury and damage any result thereof may properly be shown in evidence, but when particulars of an injury are set out the plaintiff is confined to those specified. Ib.

5. **Same: Disease.** One who has received a personal injury may show that disease resulted therefrom, such as consumption or cancer or pneumonia, etc., but there must be sufficient averment in the declaration. Ib.

6. **Competency of Physician: Instruction.** Though a plaintiff fail to call his physician and the defendant calls him and plaintiff claims the privilege granted by the statute, the defendant is not entitled to an instruction calling the jury's attention to those matters and suggesting an unfavorable inference as to the character of the physician's testimony. Ib.

7. **Examination to Testify: Statutory Construction.** The privilege granted by the statute is humane in its object encouraging the patient to offer every aid to impart information for relief; but when a physician is called not with the view of prescribing, but to qualify as a witness, the result of his examination is not privileged. Ib.

8. **Slander: Plaintiff's Appearance.** In an action for slander evidence that plaintiff appeared very much distressed and grieved when she learned of the fact of the slander is admissible. Brown v. Wintsch, 264.

9. **Same: Pleading.** In a petition for slander where the language is unambiguous an innuendo is unnecessary; and where the meaning of the words charged is obvious the statement of a witness in regard to what defendant meant is of no importance since it can have no effect on the jury. Ib.

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10. **Pleading: Witnesses' Credibility.** Evidence of matters not in issue under the pleadings should not be admitted nor should evidence tending merely to prejudice a party before the jury for the simple purpose of discrediting him. Edger v. Kupper, 280.

11. **Reformation: Similar Contracts.** In an action to reform a contract in a deed evidence that defendant company accepted similar deeds and executed the contract therein in the manner sought by the plaintiff, is admissible. Owens v. Railroad, 320.

12. **Parol Evidence to Explain Written Contract: Contract Incomplete.** A memorandum of a contract which does not purport to be a complete expression of the entire contract is always open to explanation by oral evidence. Hopkins v. Harlin, 465.

13. **Same.** An order signed by witnesses, directing the clerk of the court to pay their witness fees in a certain case to a bank, is not a complete contract in writing so as to exclude oral testimony in explanation, in an action by such witnesses for the fees collected against the agent of the bank, who collected them. Ib.

14. **Courts: Judicial Notice.** The court of appeals will take judicial notice of what counties are in a judicial circuit, the time of holding court in such counties and the number of judges in the circuit. State v. Pope, 520.

15. **Physician: Privileged Communication.** What the attending physician may have discovered as to plaintiff's condition at the time he examined him for the injury in litigation is privileged. Lackland v. Coal Mining Co., 634.

16. **Hearsay: Cross-Examination.** The vital and determinative reason for rejecting hearsay testimony is the desirability of testing all testimonial assertions by oath and by cross-examination, but while a party is only entitled to a fair opportunity for cross-examination, yet in the case presented in the petition considered it cannot be held that the same motive existed for cross-examination, and an action by a defendant party against plaintiff when she was under coverature in a pending action brought by her against a different person to establish her dower. Morris v. Parry, 675.

EXECUTIONS AND ADMINISTRATIONS. See **Administration.**

FELONY. See **Bribery, 3, 5.**

FENCES AND INCLOSURES.

1. **Division Fences: Evidence: Peremptory Instruction.** On the evidence a peremptory instruction to find for the plaintiff is sustained. Cotton v. Huston, 70.

2. **Injuring Animals: Negligence.** Under sections 3294 and 3298, Revised Statutes of 1899, if the proprietor of any field fails to inclose it by fence filling the requirements of section 3295, and animals running upon the common range enter his field on account of his failure to maintain a lawful fence, and if he kills or injures said animals by worrying with dogs or otherwise, he is liable to the owner of such animals in double the damages inflicted, irrespective of whether he was careful or negligent, humane or malicious, in driving such animals out of his field. Woods v. Carty, 416.

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8. **Pulling Down Fence.** Under section 1958 of the Revised Statutes of 1899, one who tore down a fence in which he had no interest, between his land and that of a neighbor, was guilty of a crime. although the fence was not so far completed as to "inclose" the neighbor's land. State v. Hays, 440.

FOREIGN STATUTE. See **Railroads, 9.**

FORGERY. See **Banks and Banking, 1.**

FORNICATION. See **Slander, 2.**

FRAUD. See **Bills and Notes, 3, 5, 6, 7; Fraudulent Conveyances, 5; Insurance, 2; Pleading, 1.**

FRAUDULENT CONVEYANCES.

1. **Administration: Action.** Neither the administrator nor the heirs can maintain an action to set aside a fraudulent conveyance of the intestate; such action can alone be maintained by creditors and those in privity with them. **Ellison, J.,** dissenting in a separate opinion. Hayes v. Fry, 20.

2. **Same: Creditors.** The administrator under our statute is a trustee, first for the creditors, next for the heirs, and if the estate be insolvent, the heirs, having no practical interest, the administrator is merely a trustee for the creditors. Ib.

3. **Same: Estoppel.** Where the administrator represents those bound by the act of the testator he is bound; but he is not so bound where he represents those not bound by the testator's acts, as for instance, creditors. Ib.

4. **Same: Release: Consideration: Action.** Where a discharge of all claim of work is not a gift but simply a receipt without consideration, the administrator may maintain an action to recover such claim just as the intestate could. Ib.

5. **Same: Fraud.** Where a discharge has been fraudulently obtained from an intestate by coercion or persuasion, his administrator may take advantage of the fraud and have such discharge set aside. Ib.

6. **Gifts: Acceptance: Evidence.** To make a gift of a labor account against the debtor there must be a completed act and some evidence in writing delivered to the donee by the doner, as, for instance, a receipt. Ib.

7. **Husband and Wife: Payment of Liens: Creditor's Rights.** A wife bought her husband's real estate at an execution sale against him. Subsequently the husband paid off several mortgages on such real estate. *Held*, by the payment husband was fraudulent as to existing creditors whom he was hindering and delaying and such creditors were entitled to subject the land to the payment of their debts even though the wife had no fraudulent intent in the transaction. Delo v. Johnson, 642.

8. **Same: Equity.** As the husband was insolvent the chancery proceeding was the proper mode to reach his interest in such lands. Ib.

9. **Same: Decree.** The decree is held sufficient to protect the wife's interest since it makes the money paid by her a first lien and secures her the surplus in the land after the payment of the judgment creditors. Ib.

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GAMING.

1. **Election Bet: Recovery of: Execution Purchaser.** A purchaser at an execution sale is not within the statute allowing the recovery of property lost in gaming and has no right legally or equitably as against the winner thereof. Crenshaw v. Mining Co., 355.

2. **Same: Dividend of Corporation Stock.** Plaintiff won some stock in a corporation on an election bet and the loser assigned and delivered the same to the plaintiff who presented them to the secretary of the corporation for transfer which was not done, but some dividends were paid thereon. *Held*, he was the absolute owner of the stock and the refusal to transfer the stock in no manner affected his title or his right to the dividends. Ib.

3. **Same: Winner's Title: Corporation Stock.** A corporation cannot set up as a defense to an action for dividends due on its stock, that the plaintiff won the same on an election bet, where the defense is asked not in the interest of morality but to aid one who is one of its stockholders and its treasurer and not the loser, when the plaintiff can make out his case independently of his illegal conduct. Ib.

GIFTS. See **Fraudulent Conveyances**, 6.

GRAND JURY. See **Indictment**, 3, 4, 5, 6.

GUARANTOR. See **Corporations**, 3.

HOMESTEAD. See **Brokers**, 2.

HUSBAND AND WIFE. See **Fraudulent Conveyances**, 7, 8, 9.

INDICTMENT.

1. **Dramshop Keeper: Open on Sunday: Duplicity.** An indictment under section 3011, Revised Statutes 1899, charging a dramshop keeper with keeping open his dramshop and selling and giving away and suffering to be sold and given away, etc., intoxicating liquors on Sunday, etc., is sufficient and not subject to the objection of duplicity. State v. Ambs, 20 Mo. 214, distinguished. State v. Schleuter, 7.

2. **Same.** In such indictment it is not necessary to use the word "unlawfully" since the statute does not use it. Ib.

3. **Grand Jury: Prosecuting Attorney: Attorney-General: Statutory Construction.** When the Attorney-General is called by the Governor under section 4940, Revised Statutes 1899, to aid the prosecuting attorney, he has the same rights and duties in regard to the grand jury that the prosecuting attorney has and may be present before them to give advice and examine witnesses; and the fact that he does so without objection from the jury will imply their consent thereto. State v. Sullivan, 75.

4. **Same:** The fact that the circuit judge, prosecuting attorney and grand jury may request the Governor to order the Attorney-General to aid the local prosecutor can only give emphasis to the necessity, but is unnecessary to the exercise of such power by the Governor. Ib.

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5. **Same: Stenographer: Harmless Error: Statutory Construction.** The whole framework of the grand jury's organization and the safeguard of secrecy in its deliberations excludes the idea that anyone save the officers especially mentioned may sit in its presence or aid in the performance of its duties; and the presence of a stenographer, though a court official, and sworn to keep secret the proceedings, is a manifest impropriety, however pressing may be the necessity therefor; but though improper and irregular such fact does not avoid the action of the jury unless it appear that the defendant was harmed or prejudiced thereby. Ib.

6. **Same: Absence of Member.** It can make no difference to defendant that a juror was absent at a time when defendant and the charge against him were not under consideration. Ib.

INFANT.

1. **Guardian Ad Litem.** After the commencement of a suit against an infant and service of process on him, the suit should not proceed further until a guardian is appointed to represent him. State ex rel. v. Gawronski, 414.

2. **Same: Motion to Set Aside Judgment.** Where a judgment had been rendered against a minor, charging his land with delinquent taxes without the appointment of a guardian *ad litem*, his motion to set aside the judgment was the proper remedy and should have been sustained. Ib.

INFORMATION. See **Dramshops**, 3.

INJUNCTION. See **Justices' Courts**, 3; **Landlord and Tenant**, 6, 7, 8.

1. **Assessment of Damages: Notice: Jurisdiction.** Where upon the trial a temporary injunction is dissolved and the plaintiff appeals and the judgment is affirmed, the circuit court has jurisdiction to assess the damages at its next term after such affirmation, on the motion of the defendant with due notice thereof to the plaintiff. Railroad v. Sweet, 100.

2. **Judgment: Execution Sale.** As a general rule in Missouri an injunction will not lie to restrain an execution sale of land under a void judgment. Henman v. Westheimer, 191.

3. **Same: Oral Testimony.** But where the invalidity of the judgment is not apparent upon the record and such defect must be proved by extrinsic evidence—especially oral testimony—the sale will cast such a cloud that a court of equity will prevent it. Ib.

INSTRUCTIONS. See **Bills and Notes**, 5, 6; **Common Carriers**, 3, 6; **Contracts**, 2; **Damages**, 4, 5, 10, 11, 14, 15; **Evidence**, 6; **Master and Servant**, 16, 17; **Municipal Corporations**, 8, 13, 14; **Negligence**, 3; **Partnership**, 6; **Payment**, 2; **Practice, Trial**, 6, 10; **Principal and Agent**, 3; **Witnesses**, 1.

1. **Harmless Error.** An error in giving an instruction is harmless where it is in favor of the party complaining. Howard v. Railroad, 574.

INSURANCE. See **Maintenance**, 3.

1. **Cash Premium: Stipulation: Note.** On a stipulation in the articles of association of a mutual company it is implied that

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one-half of the premium may be paid in a note of the assured. Graham v. Insurance Co., 95.

2. **Same: Note: Fraud.** The fact that an insurance agent folded a note in a certain way when he handed it to the maker for his signature is, without more, insufficient to show fraud; and one signing a contract is conclusively presumed to know its contents and his failure to read does not alter the rule. Ib.

3. **Agent's Power: Waiver: Consideration.** An agent of an insurance company has no power to waive the consideration of a policy, unless it be specially conferred by the corporation itself. Ib.

4. **Application: Company's Act.** Where the agent of the insurer makes application without the insured's assistance and presents the same with the request that the latter sign it, the statements therein are the statements of the company itself. Bushnell v. Ins. Co., 223.

5. **Tenant's Negligence: Instruction.** A stipulation in a policy of fire insurance made any act of gross negligence by the tenant the act of the insured. An instruction that if the jury believe the tenant burned a brushpile in "dangerous proximity" to the house and therefrom the house took fire, there could be no recovery, is properly refused, since there is no question of negligence embraced therein. Ib.

6. **Subsequent Encumbrances: Notice: Assessments: Estoppel.** Where the insured notifies insurer's agent of subsequent encumbrances and the company thereafter collects assessments it is estopped from claiming that notice should have been given to the directory conceding notice to them ordinarily necessary. Ib.

7. **Same: Transfer: Construction.** A stipulation in a policy of fire insurance made any transfer or change of title avoid the policy. *Held*, this did not mean an encumbrance or mortgage but a change in the title.

8. **Life: Misrepresentations: Defense: Deposit.** In order that a misrepresentation of the assured shall forfeit a life policy it must be averred and shown that the subject-matter of the misrepresentation caused the death and the insurer must deposit in court the premiums paid by the assured. Herzberg v. Brotherhood, 328.

9. **Accident: "Voluntary Exposure to Danger" Demurrer to Evidence.** In an action on a policy of insurance against bodily injury sustained "through external, violent and accidental means" where the deceased, a train porter, on his own train being delayed, was sent to flag approaching trains, as it was his duty to do, and was run over and killed, evidence that he was seen lying on the track and partly raised himself just before he was struck, would not warrant the sustaining of a demurrer to the evidence, because inferences are deducible from the situation other than a voluntary exposure. Bateman v. Insurance Co., 443.

10. **Same: Sitting on Railroad Track.** That the deceased sat down on the track while waiting for a train to approach, was not conclusively a voluntary exposure to unnecessary danger. Ib.

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11. **Same: Going to Sleep on Track.** That he went to sleep on the track was not a "voluntary" exposure to such danger if he unconsciously fell asleep, or unless he went to sleep intentionally. Ib.

12. **"Unnecessary Danger."** The expression "unnecessary danger" as used in a policy of insurance against accidents, where an exception is made in case of voluntary exposure to unnecessary danger, means danger not incident to the duty or avocation of the insured. Ib.

13. **"Voluntary Exposure."** The expression "voluntary exposure" in such a policy means a danger incurred consciously by the insured and of his own volition. Ib.

14. **Life: Past Due Premiums: Consideration: Estoppel.** Although upon the receipt of past due premiums the assured signed a statement that its acceptance was not a precedent or a waiver, yet where the insured continues to receive such past due premiums through a long course of years, it becomes a course of business between the parties, and the insurer is estopped from taking advantage of the agreement, which is so often waived, after receiving the benefits thereof, and the question of consideration from the agreement that the acceptance should not be a waiver is immaterial. Wagaman v. Insurance Co., 616.

15. **Same: Agent's Knowledge.** Though an agent's authority is limited and such limitation is known to the assured, yet the acts of the agent are the acts of the company itself, even though exceeding the limitation and courts ought not to aid insurers in technically avoiding liability after rich harvests of premiums for years. Ib.

16. **Policy Stipulation: Agent's Authority.** A stipulation in a policy that the agent only has power to receive premiums does not conclude the inquiry into the extent of his authority, and the test of his authority is what he did in the usual course of the company's business. Ib.

INTEREST. See **Condemnation, 1; Taxbills, 10, 11.**

INVITATION. See **Negligence, 1.**

IOWA. See **Master and Servant, 1.**

JOINTURE. See **Administration, 15.**

JUDGMENT. See **Administration, 9; Infants, 2; Injunction, 2, 3; Justices' Courts, 2, 3; Pleading, 7; Practice, Trial, 7, 8, 9; Reference, 1; Replevin, 1; Taxbills, 11.**

JURISDICTION. See **Administration, 2, 3; Injunction, 1; Justices' Courts, 1, 2, 3; Practice, Trial, 7; Railroads, 10; Roads and Highways, 1, 2.**

1. **Party: Special Appearance: Revival of Action.** Where the circuit court has jurisdiction and orders a cause revived in the name of the plaintiff's administrator, the voluntary appearance of the defendant gives the court jurisdiction over the parties but the defendant has the right by special appearance to test the jurisdiction of the court and such appearance may not be construed into a general appearance. Railroad v. Woodson, 208.

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2. **Title to land involved.** Where the question at issue was whether minor children were entitled to retain and occupy a homestead until they become of age, although the value of the property had increased after the setting apart of the homestead so that it exceeded $1,500, or whether it should be sold and $1,500 set apart for the minors and the remainder divided among the owners in fee, was a question so far involving or affecting the title to real estate that the court of appeals would not assume jurisdiction. Brewington v. Brewington, 569.

JURY. See **Administration**, 1; **Brokers**, 1; **Common Carriers**, 4, 5, 24, 25; **Damages**, 6, 19; **Master and Servant**, 6, 11, 14; **Municipal Corporations**, 10; **Parent and Child**, 1; **Practice, Appellate**, 12; **Railroads**, 16; **Vendor and Vendee**, 1.

1. **Juror: Competency: New Trial.** A new trial in a criminal prosecution should not be granted on the ground that a juror was akin to witnesses for the State, where they are not shown to be prosecuting witnesses. State v. Barnett, 584.

JUSTICES' COURTS. See **Landlord and Tenant**, 8; **Pleading**, 3; **Railroads**, 15, 18.

1. **Change of Venue: Notice: Jurisdiction.** On a change of venue the justic. to whom the case is sent must set the same for trial and cause the parties to be notified which notice must be served as an original summons. Until the statute is complied with any judgment rendered by the justice is premature but not void or subject to collateral attack, since the court had jurisdiction of the subject-matter and the parties. Cullen v. Collison, 174.

2. **Docket Entries: Judgment: Jurisdiction.** The failure of a justice to enter in his docket the date of the issue of the summons and of the return day, and that after service the justice waited three hours after the time specified for the appearance of defendant, and fails to show that the judgment was entered in defendant's absence on default, and certain other omissions, and merely shows that no evidence was heard, are mere irregularities and do not reach the court's jurisdiction. Henman v. Westheimer, 191.

3. **Judgment: Jurisdiction: Summons: Evidence: Injunction.** A justice cannot obtain jurisdiction of a person without due process, and where the constable changes the return day in his writ the justice acquires no jurisdiction and the judgment is void, but such defect can only be shown by parol evidence, and a sale of land under execution will cast a cloud on the title that may be prevented by injunction. Ib.

4. **Statement: Amendment: Departure.** A suit against the defendant company was for goods sold and delivered on an ordinary billhead of the plaintiff on the back of which was indorsed "Damages for injury to goods in transit as per statement hereto attached." The summons was to answer a complaint founded on a petition for damages. The amendment in the circuit court was a claim against defendant as a common carrier for damages to goods in transit. *Held*, the indorsement on the back of the account could not vary or contradict it and the amendment was a substitution of another cause of action. Alder & Co. v. Railroad, 339.

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5. **Same: Intention.** The intention of the pleader must be ascertained from the contents of the pleading. Ib.

6. **Same.** Section 3853, Revised Statutes 1899, refers to the amendment to a defective or insufficient statement and can have no application to a properly stated cause of action. Ib.

7. **Same: Pleading.** Pleadings in justices' courts are to be liberally construed but not so as to substitute one cause of action for another. Ib.

8. **Appeal: Notice: Signature.** A notice of appeal should strictly comply with the statute, but it is only intended to notify, and if, under a fair and reasonable interpretation, it does this, it is sufficient, and the signature of the attorneys of the appellant is sufficient and pronouns used in the notice will refer to the appellant and not the attorneys. Igo v. Bradford, 670.

LANDLORD AND TENANT. See **Railroads**, 3.

1. **Covenant to Put in Possession: Waiver.** Where a tenant is advised that a preceding tenant intends to hold over a part of the leased premises, and on the day of the commencement of the lease such preceding tenant is still in possession, but the new tenant enters into possession of the other part of the premises and pays the full month's rent for the whole of it, the latter tenant accepts constructive possession of the part retained by the former tenant and after such waiver may not complain that he was deprived of the actual possession of such portion of the premises. Rieger v. Welles, 166.

2. **Duty to Put in Possession: Action.** Where a tenant is prevented by a wrongdoer from taking possession he is not compelled to proceed against the latter but may bring his action against his lessor on his covenant to deliver possession. Ib.

3. **Lease: Interpretation.** What passes by a lease depends upon the intention of the parties to be ascertained from the instrument itself and the character and surroundings of the premises; and in the absence of stipulation the lessee of a business building acquires title to the whole of the building including both sides of the outer walls and has exclusive right to use the walls for all legitimate purposes. Bagley v. Rose, 344.

4. **Same: Office Building.** The rights of tenants of an office building must be so curtailed that they will not interfere with each other, and one possesses the right to the support and enclosure of the outer walls, but the title to such walls remains vested not in the tenant but in the landlord who must maintain them for the benefit of all. Ib.

5. **Same.** A landlord of an office building may deprive his tenants of any use of the outer walls by stipulations in his leases and then use the same for revenue purposes. Ib.

6. **Same: Advertisements: Injunction.** A landlord of an office building, who by his leases denies his tenants any use of the walls for advertising their business, may not use such walls so as to inflict damages upon his tenants by placing thereon advertisements injuring the business of the tenants; but he cannot be enjoined from using the walls for advertising on the ground that such advertisements are not in good taste. There must be substantial damage. Ib.

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7. **Renewal of Lease: Specific Performance.** Where the habendum clause of a lease ran to the lessees and their assigns, a covenant of renewal ran with the land and the assignee of the original term could maintain an action to enforce the specific performance of the covenant to renew. Blount v. Connolly, 603.

8. **Same: Justices of the Peace: Injunction.** Where the landlord at the expiration of the leasehold term, brought an unlawful detainer suit against the tenant before a justice of the peace, the latter could not set up his equitable right to compel a renewal in defense of the action, and his proper remedy was by action in the circuit court to enjoin and compel specific performance. Ib.

LEGISLATOR. See **Bribery, 1.**

LICENSE. See **Dramshops, 4; Negligence, 1.**

LIMITATION. See **Action, 3; Covenant for Title, 2; Principal and Surety, 1; Water and Water Courses, 3.**

1. **Note: Endorser: Payments by Maker.** The payments by the maker of a note do not defer the running of the statute of limitations in favor of the endorser of the note, since the cause of action against him is based on his independent contract created by the endorsement. Monroe v. Herrington, 509.

2. **Same: Written Acknowledgment of Debt.** A letter written by the endorser of a note which related to the note, did not postpone the running of the statute of limitations, in the absence of an unequivocal acknowledgment of the debt. Ib.

3. **Same: Estoppel.** One liable on a note who procures an extension of time by a positive agreement to waive the defense of the statutes of limitations, is estopped to set it up when sued on the note. Ib.

4. **Same: Agreement to Pay.** But a verbal agreement by the endorser to pay whatever remains due after the holder of the note should exhaust his remedy against the deceased maker's estate, on account of which the holder, at the endorser's request, forebore to sue until the statute had run, was a contract within the words of the statute, and was not binding upon the endorser. Ib.

5. **Same: Estoppel.** Nor would the endorser, when sued on the note, be estopped to assert the statute of limitations, because to allow an estoppel in such a case would be an evasion of the statute. Ib.

MAINTENANCE.

1. **Champerty: Action.** Maintenance is an old action at common law, the right of which still exists and consists in the officious intermeddling in a suit that in no way belongs to one, by assisting either party with money, or otherwise in his action; it differs from champerty in that it is voluntary while the champertor has in view a share of the spoils of the litigation. Breeden v. Ins. Co., 312.

2. **Pleading.** A petition alleging that the defendant intermeddled in a suit plaintiff was having against a mining company for per-

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sonal injuries and thereby the litigation was delayed until the mining company became insolvent and the plaintiff was compelled to accept one thousand dollars in payment of a three thousand five hundred dollar judgment, states a cause of action. Ib.

3. **Defense: Personal Injury: Insurance.** Where a mining company has taken insurance against the personal injury of its employees, the insurer may interfere and assist the mining company in a suit brought against it for a personal injury by one of its employees, and such interference is not maintenance; nor would the interference in the defense of a suit by persons sustaining many other relations to the defendant, such as parent in aiding a child or one in assisting a poor friend, constitute maintenance. Ib.

MARSHALLING ASSETS. See **Condemnations, 1.**

MASTER AND SERVANT. See **Negligence, 2.**

1. **Iowa Fellow-Servant Law: Railroads: Moving Trains.** Under the Iowa fellow-servant statute if a railroad employee is injured by the negligence of his fellow-servant he is not entitled to recover, unless his injury was in some way connected with the movements of trains. Depuy v. Railroad, 110.

2. **Fellow-Servants: Alter Ego: Railroads: Negligence.** Where the negligent act is done by one having authority as an *alter ego*, but relates simply to his duties as a co-laborer with those under his control, the common master is not liable; and it is held that a defendant railroad was not liable for the stroke of a fellow-servant in fixing a piling cap, although he did it by the direction of the bridge boss. Ib.

3. **Same.** *Held*, that the defendant railroad was liable for injury resulting from a method of lowering a piling cap adopted by its bridge boss, and in adopting such method he was not the fellow-servant of the plaintiff. Ib.

4. **Same.** *Held*, under the facts in the case, it was for the jury to determine whether defendant furnished a reasonably safe working place for the plaintiff. Ib.

5. **Assumption of Risk: Dangerous Place: Experienced Workmen.** Though the servant assume the hazard incident to his employment, yet the master is not relieved of the obligation to exercise care for his safety. Ib.

6. **Same: Contributory Negligence.** Mere knowledge of danger in the work or the implements used will not defeat the injured servant's act, unless the danger be glaring. Ib.

7. **Same: Evidence: Jury Question.** *Held*, plaintiff was entitled to go to the jury on the question of negligence, first, in regard to the method selected by the foreman for lowering the cap; and second, on the safety of the place of work. Ib.

8. **Pleading: Petition: Negligent Fellow-Servant.** Whatever the rule in other jurisdictions, in Missouri it is sufficient if a petition by a servant for the negligence of the master alleged the defect was known to the latter without being known to the former; and though a petition allege that plaintiff was aware of the incompetency of his fellow-servant and had notified the mas-

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ter thereof, yet the fact would not preclude a recovery unless the danger was so apparent that a reasonably prudent person would not have continued in the service; and such matters are affirmative defenses to be pleaded and the petition considered in the opinion is held sufficient. Adams v. Machine Co., 367.

9. **Negligent Fellow-Servant: Presumption: Instruction.** Where a servant knows that a certain platform about which he is to work had been placed in position by a negligent fellow-servant, it is error to tell the jury that he had a right to presume that the platform had been properly placed, since it is equivalent to instructing them to find for plaintiff on the pivotal point in the case. Ib.

10. **Same.** While it is presumed that everyone exercises ordinary care, yet, where there is evidence tending to remove the presumption, reference to such presumption in an instruction is usually to be avoided. Ib.

11. **Same: Evidence: Jury.** Evidence is reviewed and held sufficient to send to the jury the question of plaintiff's contributory negligence in working about the platform which he knew to have been placed in position by a negligent fellow-servant without looking to see whether the same was securely placed. Ib.

12. **Fellow-Servant: Evidence.** Evidence relating to the duty of a fellow-servant in unloading lumber from a car to a wagon is reviewed and found to show that the injury occurred by the act of a fellow-servant, and not of the vice-principal. Stephens v. Lumber Co., 398.

13. **Same: Vice-Principal: Dual Capacity.** It is the character of the negligent act itself which determines the relation of the actor to the injured servant; if the act be in the exercise of delegated authority the master is liable, if it arises from mere colabor it remains the act of the servant. Ib.

14. **Same: Jury.** Whether servants of the same master are fellow-servants is generally a question of fact for the jury; but if the facts are admitted and all reasonable men will agree in the legitimate conclusions to be drawn therefrom, it is a question of law. Ib.

15. **Negligence: Conflicting Evidence: Appellate Practice.** Where the evidence is conflicting and the finding is for the plaintiff the appellate court in passing upon the verdict will not consider the sufficiency of the plaintiff's testimony. Lackland v. Coal Mining Co., 634.

16. **Instruction: Prudent Man.** The contention that an instruction was vicious in using the term "prudent" man without qualifying it with "reasonably" is held not well taken, since the objection is nullified by other parts of the same instruction. Ib.

17. **Assumption of Risk: Instruction.** An instruction constituting a general statement of the law in regard to the assumption of risk is held to have been harmless. Ib.

18. **Damages: Future Pain.** An instruction permitting the jury to take into consideration the physical and mental pain and suffering which plaintiff "will suffer" in the future is held not to permit the jury to indulge in mere conjectures and possibilities in fixing the damages. Ib.

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MECHANICS' LIENS.

1. **Completion of Building: Time of Filing Lien.** When a building is substantially completed and is accepted, the contractor cannot afterwards, against the will of the owner, provide some part called for in the contract but omitted in the construction, and thereby extend the time for filing his lien. Stair Mfg. Co. v. Maddox, 57.

2. **Same: Evidence.** Where there is a dispute in regard to the necessity of certain items in a lien account being extras, necessitated by a change in the plans, which became necessary to complete the building, it is error to give a peremptory instruction for the defendant, but it should be submitted to the jury to determine whether they were necessary and so extended the time for filing lien account. Ib.

3. **Notice of: Immaterial Date: Statutory Construction.** A recitation in a notice of intention to file a mechanic's lien that it will be filed on a given date, which is within the ten days, will not vitiate the lien which is not filed until the expiration of the ten days, since such date is not required by the statutes and is therefore immaterial and mere surplusage, especially where no injury has occurred to the landowner by reason thereof—and since the statute is to be liberally construed to carry out its beneficent object. Faulkner v. Bridget, 377.

MINES AND MINING.

1. **Dependent Mother: Other Support: Statutory Construction.** Where a mother is wholly without means and formerly lives with other children, and before and at the time of her son's death is supported by him, and thereafter returns to her other children, she was a dependent on the deceased son within the meaning of section 8820, Revised Statutes 1899, and the fact that she found another to support her after his death can make no difference. McDaniels v. Mining Co., 706.

2. **Caving Roof: Adjoining Mine: Conflict of Evidence: Appellate Practice.** Where there is conflict of evidence as to whether the alleged caving occurred in defendant's mine or the adjoining mine, the question is for the jury and appellate courts are bound thereby. Ib.

3. **Props: Statutory Construction.** Section 8822, Revised Statutes 1899, requires the mining companies to furnish and send down into the mine sufficient supply of timber so that workmen at all times might be able to properly secure the workings from caving in. This is an imperative requirement and not a question of reasonable diligence, and on evidence extraordinary means were required for safety and timber should have been furnished to meet the requirement of the situation. Ib.

4. **Same: Care.** While the statute does not make the mining company an insurer it does insure the miner means to protect himself to the fullest extent; the term "properly secure" does not mean reasonably safe, but safe from danger, and extraordinary care is required of the company. Ib.

MISDEMEANOR. See **Bribery**, 2, 3, 4, 5.

MONEY HAD AND RECEIVED. See **Corporations**, 3, 4.

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MUNICIPAL CORPORATION. See **Taxbills.**

1. **Occupation Tax: Repeal: Statutory Construction.** Section 5508, Revised Statutes 1899, has not been repealed by section 8043, and cities of the second class may levy and collect a tax against insurance agents. St. Joseph v. Insurance Company, 124.

2. **Fourth Class Cities: Ordinance: Sidewalk: Shade Trees.** A city of the fourth class has power by ordinance to condemn a sidewalk, and it is not liable in damages for the removal thereof when so condemned, nor is it liable for the destruction of shade trees in front of a lot which are an obstruction to the proper and uniform construction of a sidewalk. Scott v. Marshall, 178.

3. **Validity of Ordinance: Cattle.** Under section 5959 of the Revised Statutes of 1899, a city of the fourth class has power to both regulate and restrain the running of cattle at large within the corporate limits. City of Doniphan v. White, 504.

4. **Same: Regulating Cattle.** And under the power to regulate, an ordinance prohibiting cattle with horns from running at large was valid and not an unreasonable discrimination between cattle with horns and cattle without horns. Ib.

5. **Statutory Construction: Employment of Counsel.** Under section 5907, Revised Statutes 1899, the mayor and board of aldermen may, when necessary, employ additional counsel and pay a reasonable compensation for his services, and the mayor by himself may not make such employment. Dougherty v. Excelsior Springs, 623.

6. **Employment of Counsel: Ratification.** An acceptance or adoption of an act performed by another as agent in particular confirmation of what has been done without original authority constitutes ratification, and a municipal corporation may ratify the unauthorized acts of its officers which are within the scope of the corporate powers. Ib.

7. **Fourth Class Cities: Board of Aldermen: Ratification.** At a meeting of the board of aldermen of a city of the fourth class with three members present, two voted affirmatively; one negatively on the allowance of the account of an attorney employed by the mayor alone. *Held*, per **Smith, P. J.**, the allowance was invalid and did not constitute a ratification of the act of the mayor, since a majority of the council did not vote in the affirmative; per **Ellison, J.**, **Broaddus, J.**, concurring, the three present constitutes a quorum and the two voting affirmatively constituted a majority of the quorum and the allowance was valid and ratified the act of the mayor. Ib.

8. **Defective Sidewalk: Degree of Care: Instruction.** A municipality should keep its sidewalks in a reasonably safe condition and instructions increasing its burden in that regard should not be given; and in this case such instructions were not cured by others given. St. Louis v. Kansas City, 653.

9. **Defective Sidewalk: Notice: Repair.** Where a defect in a street has existed for nearly two years the law will presume the municipality has not only had notice thereof but sufficient time to repair the same. Hitt v. Kansas City, 713.

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10. **Same: Presumption: Jury.** A pedestrian ordinarily has the right to presume the street is in a reasonably safe condition, but at the same time he is required to exercise proper care which is a question for the jury. Ib.

11. **Same: Light.** The fact that the sidewalk is well lighted will not remove the presumption that it is safe unless the pedestrian has knowledge of the defect. Ib.

12. **Contributory Negligence.** On the facts in the record there is no theory upon which to charge the plaintiff with negligence. Ib.

13. **Defective Sidewalk: Instructions: Assuming Fact: Scienter.** An instruction is held not to contain the vice of assuming a fact and appellant errs in claiming the injured party had knowledge of the defect. Small v. Kansas City, 721.

14. **Same: Repairs: Scienter: Instructions.** It is held that instructions are proved in the case of 185 Mo. 291. Ib.

NEGLIGENCE. See **Common Carrers**, 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 23; **Electricity**, 1, 2, 3, 4; **Fences and Inclosures**, 2; **Insurance**, 5; **Master and Servant**, 2, 3, 4, 6, 7, 8,9, 10, 11, 15; **Municipal Corporations**, 12; **Pleading**, 11, 13; **Railroads**, 13; **Water and Water Courses**, 1.

1. **Use of Premises: Invitation: License.** The distinction between an invitation and a license, though difficult often to make, appears to be that the invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or profit of the party using it. Archer v. Railroad, 349.

2. **Elevator: Evidence: Master and Servant.** The evidence relating to the condition of an elevator is held to show negligence, and that the injury resulting therefrom did come within the assumption of risk by the servant, and the facts did not warrant the conclusion that the servant was guilty of contributory negligence, which question was properly submitted to the jury. Zongker v. Mercantile Co., 382.

3. **Pleading: Evidence: Instruction.** While a general charge of negligence will suffice, yet, if followed by particulars the latter become the issues, and the plaintiff may not broaden them by evidence or instruction. Lowenstein v. Railway Co., 686.

NEW TRIAL. See **Practice, Trial**, 1, 2, 3, 4, 14, 17.

1. **Newly-Discovered Evidence.** A new trial upon the ground of newly-discovered evidence will not be granted, where such evidence does not go to the controlling issue in the case, and where it is not likely an opposite result will be reached on the merits if a new trial was granted. Howard v. Railroad, 574.

2. **Trial and Appellate Practice: Newly-Discovered Evidence: Discretion.** In the matter of new trial on the ground of newly-discovered evidence much is left to the discretion of the trial court; and the appellate court must find an abuse of the sound discretion before interfering. Lackland v. Coal Mining Co., 634.

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NOTICE. See **Covenant for Title, 5; Damages, 6, 7; Injunction, 1; Insurance, 6; Justices' Courts, 1, 8; Mechanics' Liens, 3; Municipal Corporations, 9, 13, 14; Practice Appellate, 21; Roads and Highways, 2; Taxbills, 6, 7.**

NUNC PRO TUNC. See **Practice Trial, 1, 2, 3, 4.**

OFFICES AND OFFICERS. See **Administration, 6; Roads and Highways, 5, 6.**

ORDINANCE. See **Action, 1; Municipal Corporations, 2, 3.**

PARENT AND CHILD. See **Mines and Mining, 1.**

1. **Emancipation: Evidence: Jury.** No formal act is required to effect the manumission of a minor child, and although the intention must be clearly established it may be inferred from conduct alone and should be submitted to the jury. Zongker v. Mercantile Co., 382.

2. **Same: Prochein Ami: Earnings.** Where a parent is next friend to a son in an action for personal injury and claiming his lost earnings, the former is presumed to know the contents of the pleadings and to sanction the same and must be held to voluntarily surrender his rights to such earnings. Ib.

PARTIES. See **Jurisdiction, 1.**

PARTITION. See **Trusts and Trustees, 3.**

PARTNERSHIP. See **Corporations, 1, 2, 3, 4, 5.**

1. **What is Not: Crop.** Where the object is to divide the crop between the parties it is not a partnership. Beatty v. Clarkson, 1.

2. **Same: Testimony.** A partnership does not exist between parties associated in a common undertaking unless each has the right to manage the whole business and to dispose of the entire property involved in the enterprise; and evidence and the record fails to show a partnership between plaintiff and defendant. Ib.

3. **Same: Instruction.** It is not error to refuse an instruction included in others. Ib.

4. **Pleading: Settlement: Aider by Answer.** A petition seeking to recover at law certain items growing out of a partnership account should aver there had been a partnership settlement, but where the answer pleads such settlement and alleges the items sued on were included therein, it cures the defect of the petition. Johnson v. Powell, 249.

5. **Same: Equity.** Where partners have settled and items have been omitted the remedy therefor is at law and there is nothing to give equity jurisdiction. Ib.

6. **Sharing Profits: Agreement: Instruction.** An instruction relating to the existence of a partnership between the parties named, if they were to share in the profit and loss according to their respective interests, without regard to an express agreement to become partners and so share the profits and loss, is held proper. Bennett v. Mining Co., 317.

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7. **Same: Third Parties.** An agreement failing to make defendants partners does not prevent them becoming partners as to third parties. Ib.

8. **Settlement: Balance: Action.** A partner may sue at law a partner on a promise to pay a balance which has been struck and agreed upon. McGinty v. Orr, 336.

9. **Same: Promise.** But where there is merely a conditional promise and the condition has not been performed, no action at law to recover the balance can be maintained. Ib.

PAYMENT.

1. **Consideration: Part of Debt: Bona Fide Dispute.** The acceptance of a part of an admitted debt in discharge of the whole, will not bind the creditor for lack of consideration; but if there is an honest difference in regard to the amount due and the parties agree that the debtor may pay a less sum in full of the creditor's claim and the former does so, he is discharged. Chamberlain v. Smith, 657.

2. **Same: Instruction.** Modification of an instruction to correspond with the above rule is approved. Ib.

PENALTY. See **Taxbills, 10.**

PERPETUATION OF TESTIMONY. See **Equity, 3, 5.**

PERSONAL INJURY. See **Damages, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18; Evidence, 2, 3, 4, 5, 6, 7; Maintenance, 3.**

PHYSICIAN. See **Evidence, 6, 7, 15.**

PLEADING. See **Action, 1; Common Carriers, 6, 7, 9, 10, 17, 18; Damages, 12, 13, 14, 15, 16, 17, 18; Evidence, 2, 3, 4, 5, 6, 9 10; Justices' Courts, 4, 5, 6, 7; Maintenance, 2, 8; Negligence, 3; Practice Trial, 15; Railroads, 2; Sales, 4, 12; Slander, 1.**

1. **Petition: Warranty Deed: Shortage of Acres: Fraud.** A petition seeking to recover money paid in a real estate transaction on the ground that there is a shortage in the number of acres recited in a general warranty deed, which petition is summarized in the opinion, is held not to state a cause of action, there being no allegation that the deed was fraudulently obtained, or that anything was omitted therefrom by fraud, accident or mistake, and without such averment the deed must be presumed to contain the final contract of the parties and measure defendant's liability. Corrough v. Hamill, 53.

2. **Action: Capacity to Sue: Repeal of Statute.** An officer whose right to sue is statutory has no capacity to maintain such suit after the repeal of the statute creating his office. Wendleton v. Kingery, 67.

3. **Capacity to Sue: Demurrer: Waiver: Justices' Courts.** A failure to demur in the trial court on the ground that the plaintiff has no capacity to sue waives such objection, but this rule has no application to proceedings in the justices' courts, and, on appeal to the circuit court, the rules of practice of the latter govern the proceedings but not its rules of pleading. Ib.

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4. **Petition: Reply.** A plaintiff must recover on the allegations of his petition and not on the cause of action pleaded for the first time in his reply. Johnson v. Powell, 249.

5. **Trial Practice: Petition: Demurrer.** Where a petition alleges a particular cause of action for specifically named injuries, it is not subject to demurrer or motion, since it is not defective in form or substance, but evidence of matters outside the petition should not be admitted. Arnold v. Maryville, 254.

6. **Action: Ex Contractu: Ex Delicto: Misjoinder: Repugnancy.** One count in a petition was on a contract that plaintiff and defendant would bear one-half of any damages resulting from the negligence of a common agent or their common negligence; the second count was on an agreement after the alleged negligence that the plaintiff should settle the whole damage and defendant thereupon would pay its half. *Held*, both actions are *ex contractu* and not repugnant, and a demurrer to the second count and a motion to elect between the counts were both properly overruled. Railroad v. Railroad, 300.

7. **Same: Judgment: Cost.** The jury returned a verdict against defendant on the second count. *Held*, it was not entitled to a judgment on the first count, since the evidence of the common negligence alleged in the first count was proper as tending to show the agreement alleged in the second count and defendant would not be entitled to costs on either count. Ib.

8. **Instruction: Variance.** The petition and the instructions based thereon are examined and held to coincide and not to constitute a variance. Zongker v. Mercantile Co., 382.

9. **Counterclaim: Assigned Account: Statute.** Under the statute a counterclaim is one existing in favor of the defendant and against the plaintiff, and in an action on an assigned account for rent damages caused the tenant by delay of the assignor in making certain alterations and repairs, while giving a right of action against the assignor, do not constitute a counterclaim against the assignee. Estate Co. v. Arms Co., 406.

10. **Action on Account: Demurrer.** A demurrer will not lie to a petition stating a cause of action upon a running account made a part of the petition, on the ground that some of the items show the plaintiff is not entitled to recover on them, when the remaining items are proper matters to be stated in the account and entitle plaintiff to offer evidence in their support. Bick v. Halberstadt, 441.

11. **Two Acts of Negligence in Separate Counts: General Verdict.** Where, in an action for personal injuries received by plaintiff in attempting to board one of defendant's cars, on account of being thrown by a sudden acceleration of speed, two acts of negligence were charged against the defendant and stated in separate counts, though they could as well have been charged in one count, the petition stated but one cause of action and a general verdict thereon was good. Leu v. St. Louis Transit Co., 458.

12. **Defective Statement Cured by Verdict.** One count based on the negligence of the defendant in failing to stop the car in time to avoid the injury, alleged that though the conductor knew or by reasonable care could have known that plaintiff was being dragged, he negligently failed to signal the motorman to stop

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and by reason of that negligence the plaintiff was thrown to the ground and injured, stated a cause of action which is good after verdict, although there was no averment that if the conductor had signalled the motorman to stop, the latter could have stopped the car in time to avert the injury. Ib.

13. **Variance: Special Act of Negligence.** In an action against a railroad company for killing plaintiff's mare under, a statute allowing damages to owners of stock killed by an engine or a train at any point along the right of way where the right of way is not fenced as required by law, a petition which alleges negligence in failing to construct and maintain a lawful fence is not supported by proof that the mare got upon the right of way by coming through a gate which was left open an unreasonable time—the gate and fence being lawfully constructed under the statute. Stonebraker v. Railroad, 497.

PRACTICE APPELLATE. See **Common Carriers, 7, 10; Damages, 19; Equity, 2; Jury, 1; Master and Servant, 15; Practice Trial, 9, 18, 19; Mines and Mining, 2; Replevin, 1; Sales.**

1. **Trial Practice: Attorney and Client: Misconduct: Harmless Error.** It is highly improper for the plaintiff's attorney in his closing speech to call the jury's attention to the verdict in the justice's court, but where the error is entirely harmless it is not cause for reversal. Beatty v. Clarkson, 1.

2. **Bill of Exceptions: Record Proper.** Where there is no bill of exceptions filed in the time required by the order of the trial court, the appellate court can not consider the merits of controversies arising during the trial and must confine its review to the record proper. Wendleton v. Kingery, 67.

3. **Trial Practice: Weighing Evidence: Jury.** The issue or guilt is not triable in the appellate court, but must be determined by the jury; the trial court, having a better opportunity to weigh the evidence, is intrusted with far greater discretion than the appellate court, which can alone determine whether there is substantial evidence to support the verdict. State v. Sullivan, 75.

4. **Abstract: Respondent's Theory.** An abstract is held sufficient to decide the case on the issues involved; and as respondent declined to go into the merits of the controversy and stands on a failure of the abstract, the appellate court can not consider his theory of the case. Graham v. Insurance Co., 95.

5. **Conflicting Evidence: Jury.** Where there is a conflict of evidence the appellate courts will not interfere with the finding of the jury. Edger v. Kupper, 280.

6. **Second Appeal: Res Adjudicata.** When an appellate court determines questions of law properly before it on appeal and remands the case for trial, its rulings become the law of the case and will not be re-examined on a subsequent appeal, except for very cogent reasons, none of which appear in this case. Leicher v. Keeney, 292.

7. **Long Appeal: Abstract.** Though a complete transcript of the case be filed in the appellate court the plaintiff in error must make an abstract under Rule 15 as provided in section 874, Revised Statutes 1899, and failure to do so will be followed by a dismissal of the writ of error. Mink v. Chesney, 334.

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8. **Timely Exception.** Unless a timely exception is saved to the admission of incompetent testimony, the error can not be reviewed on appeal. State v. Hays, 440.

9. **Issue of Fact: Conclusiveness of Evidence.** Where issues purely of fact, supported by evidence are submitted to the jury, by appropriate instructions, there is nothing left for the appellate court to do but to affirm the judgment. Treffinger v. Investment Co., 453.

10. **Death of Party Not Interested.** Where a trustee, party to an action, had no interest in the issues involved in the appeal of the case, his death pending the appeal did not make it necessary to delay the case for the purpose of having his successor in trust appointed. Coffman v. Gates, 475.

12. **Jury Trial: Waiver.** The appellate court will not consider an assignment of error on the part of the trial court in failing to submit certain issues to the jury, where the record fails to show that a jury was demanded. West v. Bank, 490.

13. **Weight of Evidence.** In an action by a depositor against a bank for an amount alleged to be due, the evidence is examined and held sufficient to support a finding in favor of the defendant. Ib.

14. **Bill of Exceptions: Record Proper Must Show Filing.** The abstract of the record authorized by section 813 of the Revised Statutes of 1899, to be filed by the appellant in the court of appeals, must show by the record proper the filing of the bills of exceptions and an extension of time for filing the same if filed after the term. Williams v. Harris, 538.

15. **Same: Recitals.** The recital of such orders in the bill of exceptions will not supply the omission of them from the abstract of the entries upon the record proper. Ib.

16. **Abstract of Record.** The abstract of the "entire record" authorized by the said section 813, in lieu of a full transcript, must include the orders upon the record proper as well as the matters contained in the bill of exceptions. Ib.

17. **Abandoned Issue.** A defendant can not properly assign as error in the appellate court the action of the trial court in overruling a motion to strike out part of plaintiff's replication filed to an answer which the defendant abandoned before the trial. Strother v. Lumber Co., 552.

18. **Error Self-Invited.** A theory of law adopted by both sides in the trial of a case, though erroneous, furnishes no ground for a reversal of the case. State v. Barnett, 584.

19. **Impeaching Witness.** Where the facts testified to by the State's witness in the prosecution for a crime were shown substantially by the witness for the defendant, the refusal of the court to allow the defendant on cross-examination to show such witness for the State was prejudiced, was not prejudicial error. Ib.

20. **Remarks of Counsel: Timely Exception.** Objectionable language used by an attorney can not be reviewed by the appellate court, unless the attention of the trial court was called to such language and proper objection made. Ib.

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21. **Writ of Error: Notice: Waiver: Brief.** Plaintiffs in error filed their abstract and brief. Defendant in error thereupon filed their statement and brief, addressed solely to the merits of the case. Subsequently defendants in error filed a motion to dismiss the writ for want of notice thereof. *Held*, the filing of the briefs without reference to any defect in the proceedings relating to the writ constitute a general appearance thereto and waived the objection to the sufficiency of notice. Igo v. Bradford, 670.

22. **Affidavit for Appeal: Clerical Error.** Mere clerical errors are to be disregarded and an affidavit for appeal using the word "affidavit" where the word "appeal" should appear is a clerical error. Hitt v. Kansas City, 713.

PRACTICE TRIAL. See **Infants**, 1, 2; **New Trial**, 1; **Pleading**, 5, 10, 11, 12; **Practice Appellate**, 1, 3; **Railroads**, 6, 7; **Reference**, 1; **Taxbills**, 6, 7.

1. **Nunc Pro Tunc Order: Motion for New Trial.** Where a motion for *nunc pro tunc* order to show the filing of a motion for a new trial, shows that the latter motion was filed in vacation it precludes the granting of the order. Griffin v. Railroad, 221.

2. **Same.** A verbal understanding between the counsel and the court can not supply a record authorizing a *nunc pro tunc* entry. Ib.

3. **Same: Bill of Exceptions.** The recitations of a bill of exceptions in regard to filing motion for new trial will not justify the court in making a *nunc pro tunc* entry to that effect, when other entries show it not to be true. Ib.

4 ———: **Motion for New Trial: Record Proper.** The filing of a motion for new trial must be found in the record proper. Ib.

5. **Reply: Trial.** Where no reply is filed to the new matter set up in the answer and a trial does not proceed upon the supposition that a reply is in, the allegations of the answer must be accepted as admitted facts. St. Joseph ex rel. v. Forsee, 237.

6. **Objection to Evidence: Instruction: Estoppel.** Where evidence is admitted over defendant's objection the fact that he submits such evidence to the jury by his instruction does not preclude his continuing to object to the evidence in the appellate court, as he has a right to try the issues forced upon him. Arnold v. Maryville, 254.

7. **Judgment by Default: Motion to Set Aside: Subsequent Term: Continuance: Jurisdiction.** A motion to set aside a judgment by default filed more than four days after the judgment entry and not reached during the term, carries the case over to the next term without general or special orders of continuance and gives the court jurisdiction at such term to set the judgment aside. Harkness v. Jarvis, 277.

8. **Same.** Head v. Randolph, 83 Mo. App. 284, disapproved. Ib.

9. **Same: Discretion of Court: Appellate Practice.** The trial court has large discretion in acting on motions to set aside judgments by default and the appellate court is less apt to interfere with such discretion when the judgment is set aside than when it is not. Ib.

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10. **Instructions: Harmless Error: Verdict.** An instruction should limit the amount of plaintiff's recovery to the sum alleged in the petition, but where the verdict is less than such amount the error is harmless. Edger v. Kupper, 280.

11. **Same; Evidence.** Where there is some evidence an instruction that there is none should be refused, and on the other hand instructions should not be given without evidence to support them. Ib.

12. **Same: Matters Covered.** Instructions should clearly and concisely present the issues without unnecessary repetition, and it is not error to refuse instructions on the matters covered by other instructions. Ib.

13. **Attorney's Remarks: Objection.** It is too late to complain of the conduct of an attorney for the first time in a motion for new trial. Such concerns are matters of exception and must be brought up by bill of exceptions. Ib.

14. **New Trial: Presumption.** Though a trial court err in granting a new trial for the reason it states, its order must be upheld unless there are one or more other causes which would justify a new trial, and it is incumbent upon respondent to show such other causes, otherwise the action of the trial court is presumptively correct. Bennett v. Mining Co., 317.

15. **Pleading: Reply: Waiver.** Though there be no reply, yet if the trial and evidence proceed on the theory that there is one, the omission is waived. Zongker v. Mercantile Co., 382.

16. **Reopening Case: Discretion of Court.** Where the trial court at the close of the case made and filed its finding of facts, its refusal, the following day, to reopen the case and let in evidence of facts which the party offering it knew and could have testified to in the first instance, was proper exercise of discretion. Bank v. Brinkerhoff, 429.

17. **Newly-Discovered Evidence: Diligence.** Where a motion for new trial by a defendant on the ground of newly-discovered evidence showed by an accompanying affidavit that the witness relied upon for the new evidence had been a defendant in the case, but the suit as to him had been dismissed before the trial and that his knowledge of the facts was not communicated to the defendant filing the motion, until after judgment, no laches was shown in failing to discover such evidence before the trial. Ib.

18. **Appellate Practice: Conflicting Evidence: Proper Instructions.** Where the evidence is conflicting and the instructions so clearly and fairly present the theory of each party that the jury cannot misunderstand the issues, the appellate court cannot interfere. Bray v. Riggs, 630.

19. **Same: Evidence.** Certain objections to the admission of evidence are reviewed and where the record permits the appellate court to consider the same the action of the trial court is approved. Ib.

PRINCIPAL AND AGENT. **See Banks and Banking, 1, 2, 3; Common Carriers, 20; Insurance, 3, 16, 17.**

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1. **General Agency: Private Restrictions.** When an agent is put forward as a general agent so that others are justified in the belief that his powers are general, restrictions privately imposed will be immaterial and can have no effect on the rights and remedies of third persons. Railroad v. Railroad, 300.

2. **Same: Evidence: Expert.** One who knows may testify as to the duties of a general claim agent of a railroad, and it is not necessary to qualify such witness as an expert. Ib.

3. **Action: Instruction: Harmless Error: Burden of Proof.** An instruction relating to defendant's liability in the second count of its petition is approved, and the fact that it imposed more on the plaintiff than the law did is not reversible error; and it rightfully threw upon the defendant the burden of showing that the plaintiff had notice that the defendant's claim agent was without authority to make the contract. Ib.

PRINCIPAL AND SURETY.

1. **Surety's Payment: Equitable Assignment: Limitation.** Where a surety pays his principal's note the payment operates as an equitable assignment thereof to the surety who thereby becomes possessed of all rights and remedies which the creditor had at the time, and in equity may maintain an action for subrogation any time within ten years from maturity of the note, notwithstanding limitation may have run against his action at law. Brewing Co. v. Jordan, 286.

2. **Extension of Time: Discharge of Surety.** The extension of time by the principal on a note which would discharge his surety from liability, must be for a valuable consideration and for a definite time; a mere promise of indulgence, though upon sufficient consideration, if for no certain time, does not release the surety. Bank v. Brinkerhoff, 429.

PROCESS. See **Roads and Highways, 5, 6.**

PROHIBITION.

Other Remedy. Where no error has been committed that cannot be adequately reached by ordinary procedure, prohibition will not lie. Railroad v. Woodson, 208.

RAILROADS. See **Common Carriers; Damages, 6, 7, 8, 9; Deeds, 1; Equity, 1; Master and Servant, 1, 2, 3, 4, 5, 6; Principal and Agent, 2.**

1. **Consolidation: Liability.** If two railroads consolidate under section 1059, Revised Statutes 1899, the consolidated company assumes the liabilities of the consolidating companies. Black v. Railroad, 198.

2. **Pleading: Railroad and Railway.** In a pleading where a certain company is called interchangeably "railroad" and "railway" and there is no evidence that there is both a "railroad" and "railway" company of that name, the terms "railroad" and "railway" are not used descriptive of the distinct corporation but as descriptive of the thing meant and synonymously. Ib.

3. **Lease.** A lease of one railroad to another for a term of 99 years is to all intents and purposes a merger of the two companies. Ib.

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4. **Evidence.** Evidence that a certain line of road was included in a certain consolidation of railroad under a given lease is held to be too uncertain and insubstantial to sustain a verdict, and an error in permitting a witness to state that it belonged to a certain other railroad company is held harmless. Ib.

5. **Killing Stock: Statement: Owner of Field: Justice's Courts.** In the circuit court a petition for double damages for killing stock should properly state whether plaintiff was the owner of the field, or that the animals got into the field by reason of an unlawful fence or by permission of the owner, but such strictness is not required in justices' courts. Wages v. Railroad, 230.

6. **Same: Form of Verdict.** A form of verdict given the jury by the court and set out in the opinion is held not subject to the criticisms raised against it. Ib.

7. **Same: Verdict: Motion to Double.** After the verdict is received it is sufficient that a motion to render judgment for double the amount may be made orally and need not be in writing. Ib.

8. **Killing Stock: Prima Facie Case.** In an action against a railroad company for damages on account of the killing plaintiff's mare, under a statute allowing a compensation to owners of stock killed by an engine or train, evidence that the mare was found lying on the right of way near the track with her head badly bruised and one eye knocked out of its socket, is sufficient to support a finding that the mare was killed by an engine or train. Stonebraker v. Railroad, 497.

9. **Foreign Statute: Remedial Statute.** A statute of another State, allowing single damages against a railroad company as compensation for killing stock, is not penal but remedial and may be sued on in this State. Ib.

10. **Injuring Stock: Jurisdiction.** The requirement of section 3839 of the Revised Statutes of 1899, that an action against a railroad company for killing or injuring animals shall be brought in the township in which the injury happens or in an adjoining township, is jurisdictional and the fact must affirmatively appear in the record in order that the suit may be maintained. Shaw v. Railroad, 561.

11. **Same: Evidence.** In an action against a railroad company, under section 1106, Revised Statutes of 1899, for injury to a colt caused by its being frightened by a passing train so that it ran against a fence, evidence that the colt was found injured outside the right of way fence and had been seen inside the right of way in the morning of the same day, and that there was hair on the fence wire, was insufficient to support a verdict for plaintiff in the absence of evidence that it was frightened by a train or that it ran into the fence. Ib.

12. **"Locomotive."** The term "locomotive" as used in section 1106 of the Revised Statutes of 1899, allowing damages for live stock which may be injured by being frightened by a locomotive or train at a place where the railroad is not fenced, does not apply to a "speeder," a vehicle in form like a handcar but run by a gasoline engine. Henson v. Railroad, 595.

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13. **Killing Stock: Negligence: Switch Limits.** Where stock is killed within switch limits plaintiff must show that the negligent act of the railroad company was responsible therefor and no inference of negligence arises from the fact of the killing. Atterberry v. Railroad, 608.

14. **Same: Evidence.** On an analysis and consideration of the evidence it is held that a train could not be stopped without imperiling the persons and property thereon in time to avoid a collision with the animals after their entry upon the track. Ib.

15. **Same: Separate Counts: Justices' Court: Election.** In a justice's court plaintiff may unite counts for common-law negligence in operating its train and thereby killing his stock, and one count for the failure to ring the bell and sound the whistle and also one for failure to fence; but where the evidence will not permit a recovery on either count the plaintiff is not prejudiced by an order of the court compelling him to elect on which count he will proceed to trial. Ib.

16. **Same: Public Crossing: Jury Question.** A railroad is liable for injury inflicted at a public crossing if its servants saw or could have seen the cattle upon approaching in time to safely stop the train and then such question is for the jury. Ib.

17. **Same: Ringing Bell.** Plaintiff makes a prima facie case when he shows his animals were killed or injured by a train at a public crossing and that the bell was not rung or the whistle sounded; it then devolves upon the defendant to show that the failure was not the cause of the injury, unless this appears from plaintiff's evidence. Ib.

18. **Same: Different Counts: Justices' Courts: Election.** Where common-law negligence failure to ring the bell and failure to fence are stated in separate counts in a statement before a justice for killing stock, it is error on appeal to compel plaintiff to elect on which count he will proceed to trial. Ib.

RATIFICATION. See **Municipal Corporations, 6, 7.**

REFERENCE.

Report of Referee: Judgment. In a case in which a compulsory reference could be ordered by the court, the court has power to act upon the referee's report of the evidence, without a retrial of the issues, and, upon a hearing of the exceptions to the report, may enter judgment contrary to the one rendered by the referee. West v. Bank, 490.

RELEASE. See **Fraudulent Conveyances, 4.**

REPLEVIN.

Partial Finding for Plaintiff: Judgment: Appellate Practice. Where a jury finds that only a part of the replevined property belongs to plaintiff, the defendant is entitled to a judgment against plaintiff and his sureties for the remaining articles; but he should call the trial court's attention thereto in a proper manner and can not raise the point for the first time in the appellate court. Beatty v. Clarkson, 1.

REVIVOR. See **Action, 2, 3, 4; Jurisdiction, 1.**

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ROADS AND HIGHWAYS.

1. **Jurisdiction of County Court: Petition.** Where a county court acted upon a petition to change the route of a road, it will be presumed in a collateral proceeding that the court found, on competent evidence adduced before it, that the petition was properly signed, although the order did not recite the finding. State v. Miller, 542.

2. **Same: Petition and Notice.** The presentation of a petition to the county court for a change of road, accompanied by proof of the legal publication of notice to parties interested, gives the county court jurisdiction to order the change, and its finding and judgment will not be open to collateral attack. Ib.

3. **Same: When Court May Act.** And such a petition may be acted upon at the term at which it is presented, if lawful and timely notice has been given. Ib.

4. **Same: Errors.** The granting of a petition and ordering a change of road, without hearing evidence as to the necessity, probable damages, costs, etc., have nothing to do with the jurisdiction, but are merely erroneous procedure and can not be inquired into in a collateral proceeding. Ib.

5. **Same: Process.** Where the county court, acting upon the requisite notice and petition which gave it jurisdiction, ordered a road changed, one who closed up the old road in obedience to a direct order of the county court was acting lawfully. Ib.

6. **Same.** The rule that an officer executing process is only bound to see that it is "fair on its face" and need make no inquiry further than to ascertain if the court has jurisdiction over the subject-matter, applies to one closing up a highway in pursuance of an order of the county court. Ib.

SALES.

1. **Implied Warranty: Acceptance: Instruction: Sample.** Defendants ordered 5,000 kegs of nails from the plaintiff, saying "they were to be used in the manufacture of boxes and to be driven by machinery and must have broad heads and be of uniform length," and enclosed samples. On receipt of a shipment defendants asked an extension of sixty days to pay for those received and countermanded the order for the balance, returning forty kegs to plaintiff, the remainder, after examination were disposed of to defendants' customers. The jury were instructed that if defendants accepted the nails knowing they were inferior on quality, they could not object to such quality. *Held*, by **Broaddus**, J., that the instruction was right as there was no implied warranty. **Ellison**, J., dissenting in a separate opinion, **Smith**, P. J., concurring, holds that there was an implied warranty that the nails should conform to the sample, and the instruction should not have been given. Steel and Wire Co. v. Symons, 41.

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2. **Same: Pleading: Answer.** On pleading set out in the opinion **Broaddus, J.,** holds plaintiffs entitled to judgment on the pleadings as the answer fails to allege an expressed or implied warranty of fraud. **Ellison, J.,** in a separate opinion, **Smith, P. J.,** concurring, holds that at the trial the parties proceeded upon the theory of a warranty and an alleged breach thereof and the court must do as the parties have done and overlook any question as to the pleading. Ib.

3. **Same: Acceptance: Diminution of Purchase Price.** Where there is a warranty expressed or implied the vendee upon a breach thereof may return the goods, or accept the same and set up a breach of warranty in diminution of the purchase price. Ib.

4. **Samples: Intention: Appellate Practice: Trial Theory.** Sales by sample are matters of intention and where samples of nails desired are exhibited to a manufacturer and accepted by the latter as a sample of the nails agreed to be manufactured, and at the trial the evidence and instruction is upon the theory that the sale was by samples, the appellate court treats the case as made by the parties. Ib.

5. **Same: Manufacturer: Specific Purpose: Warranty: Instruction.** Whether the sale be by sample or by manufacture or for a specific purpose, the instruction set out in the former opinion is improper, as in each mode of sale there is an implied warranty and the buyer does not waive his right to contest the contract price by accepting the goods. Ib.

6. **Warranty of Quality: Inspection by Purchaser.** As a general rule there can be no recovery on a warranty in the sale of chattels for a perfectly obvious defect which the purchaser had an opportunity to observe, nor for a defect known to the purchaser. Doyle v. Parish, 470.

7. **Same.** But if the purchaser had no opportunity to inspect before purchase, and relied on the warranty, he is protected by the warranty, even though the defect could have been discovered by inspection. Ib.

8. **Same.** Where mules were sold with a warranty as to their age and soundness, in an action by the purchaser for breach of the warranty, evidence that the plaintiff, before the purchase, inspected the mules, would warrant the inference that he noticed the defect, and in that event he could not recover. Ib.

9. **Same: Evidence: Harmless Error.** And in such an action the handbills advertising the sale were improperly admitted in evidence, but the error was harmless where the only representation of the handbills was as to the age of the mules and the defendant admitted that he represented them to be of age mentioned in the handbills. Ib.

10. **Same.** And where it was shown that the plaintiff gave a note for the purchase price of the mules and on discovery of the defect notified some bank not to purchase the note, that action would not prevent a recovery on the warranty. Ib.

11. **Same: Measure of Damages.** In an action on a breach of warranty in the sale of mules, the measure of damages is the difference between what the mules would have been worth as represented at the time and place of sale, and what they actually were worth. Ib.

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12. **Pleading: Counterclaim.** In an action on a contract for balance due for lumber sold by plaintiff to defendant, the defense that there was a previous shortage in delivery of lumber bought under the contract, was not permissible unless pleaded by way of recoupment or counterclaim. Strother v. Lumber Co., 552.

13. **Settlement.** Where the quantity of lumber delivered under a contract was ascertained by two inspectors, one furnished by the purchaser and one by the seller, in the absence of fraud and collusion between the seller and the inspectors, the purchaser could not properly claim a shortage in the quantity delivered when sued for a balance due. Ib.

14. **Muniments of Title: Conclusion of Law.** Where the right of a party asserting title to property rests on unauthenticated documents, and no fact is proven to cast doubt on the good faith of the transactions which led to the execution of the documents as muniments of title, their effect is a conclusion of law. Brewer v. White, 571.

SAMPLES. See **Sales, 1, 5.**

SCIRE FACIAS. See **Action, 2.**

SET-OFF.

1. **Statute: Assigned Account: Liquidated Debt: Counterclaim.** A demand in the nature of a debt must be liquidated before it can be set off against an action on an account; otherwise set-off would include counterclaim which is not permitted in this State. Estate Co. v. Arms Co., 406.

2. **Same: Other Defenses.** In an action on an account for rent demands for damage to goods by reason of improper repairs and for guard hire are not such defenses as are included under the term "other defenses" used in the set-off statute, which term is restrictive and means a defense to the demand itself and not a set-off nor a counterclaim. Ib.

3. **Same.** In an action for an assigned account for rent claims for gas and water furnished by the tenant to the assignor while making certain repairs are not proper set-offs unless they have been liquidated, that is, ascertained debts as to the amounts. Ib.

SETTLEMENT. See **Sales, 13.**

SEWERS. See **Taxbills, 1, 2, 3, 4.**

SLANDER.

1. **Pleading: Instructions.** In an action for slander different sets of words spoken on different occasions may be set forth in one count and included in the same cause of action and then there can be but one general finding. And instructions set out in the opinion are approved as directing but one finding. Brown v. Wintsch, 264.

2. **Adultry: Fornication: Common Law: Statute.** At common law a charge of unchastity (when the action was not made a crime) was not actionable *per se*; but under section 2863, Revised oStatutes 1899, it is actionable to publish that a person has been guilty of fornication or adultery, and this is so whether the accused party can be legally guilty of the technical offense

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charged, since the words are used to indicate a charge of a disgraceful and immoral act. Ib.

3. Same. Christal v. Craig, 80 Mo. 367 is held inapplicable. Broaddus, J., dissenting in a separate opinion. Ib.

SPECIFIC PERFORMANCE. See Equity, 1, 2; Landlord and Tenant, 7, 8.

STATUTES CITED AND CONSTRUED.

Revised Statutes 1899.

Section 7, see page 153, 154.
8, see page 153.
10, see page 158.
11, see page 153, 154, 159.
42, see page 149.
254, see page 158.
255, see page 159.
266, see page 159.
558, see page 415.
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605, see page 411.
756, see page 214.
761, see page 214.
818, see page 335, 542.
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3294, see page 422.
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3298, see page 418, 419, 422.
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4504, see page 288.
4505, see page 288.
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5508, see page 126, 127.
5686, see page 129.
5899, see page 182.
5907, see page 626, 627, 628, 629.
5959, see page 508.
5960, see page 182, 183.
5979, see page 182.
5991, see page 182.
7798, see page 549.
7890, see page 331.
7891, see page 334.
7896, see page 331.
8043, see page 126, 127.
8820, see page 708, 710.
8822, see page 708.
9415, see page 549.
9416, see page 549.

Chapter 22, see pages 593, 594.

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Revised Statutes 1889.

Section 257, see page 68.

2253, see page 335.

2312, see page 335.

Revised Statutes 1879.

Section 806, see page 615.

2120, see page 273.

STENOGRAPHER. See **Indictment, 5.**

SUNDAY. See **Indictment, 1.**

TAXBILLS.

1. **Kansas City Charter: Sewers.** The charter of Kansas City authorizes a construction of district sewers when the city council shall deem them necessary for sanitary or other purposes. On the evidence a sewer mentioned in the opinion was not a sewer for either sanitary or drainage purposes as required by the ordinance, and the taxbills issued to pay for its construction were void. Barton v. Kansas City, 31.

2. **Same: Subsequent Connections.** The fact that after the construction of the sewer the park board may have connected catch basins along the street gutter with the sewer, can have no curative effect on the prior work. Ib.

3. **Same.** Nor can the fact that such connections were made by the park board before the taxbills were issued avail to give them any validity whatever, as the contractor must lose for the invalidity which attached to the work as it stood completed and disconnected from any subsequent consideraton. Ib.

4. **Same.** The City of St. Joseph v. Owen, 110 Mo. 445, is distinguished, and attention called to the fact that the charter of St. Joseph requires that sewers "shall be of such dimensions as may be prescribed by ordinance," while the Kansas City charter provides that the sewer "shall be of such dimensions, materials and character as shall be prescribed by ordinance." Ib.

5. **Owner: Omission of Name.** A taxbill should be issued against the record owner of the property to be charged; but omitting to name such owner in the bill will not render it invalid. St. Joseph v. Forsee, 127.

6. **Same: Suit: Notice.** The holder of a taxbill has a right to assume that the record owner is the true owner and to sue accordingly; and a sale under such judgment carries the title against the grantee in an unrecorded deed, provided the purchaser has no notice of such deed. Ib.

7. **Same: Prima Facie Case.** Anyone having an interest in the property sought to be charged may be made a party defendant, but the taxbill is not prima facie evidence against one not named therein; and a plaintiff must make out his case against such party *aliunde*. Ib.

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8. **Name of Dead Owner: Mistake: Amendment.** The requirement to insert in the taxbill the name of the owners of the respective lots to be charged should have a fair and liberal construction so as to give effect to the obvious purpose of the enactment; and where the engineer inserts the name of the record owner, who is known to be dead at the time the bill is issued, such act will be treated as a mere mistake, not as a suppression of a material fact, and an amendment will be permitted at the trial. St. Joseph ex rel. v. Forsee, 237.

9. **Same: Amendment: Evidence.** The fact of such amendment will enable the plaintiff to use the bill to make a prima facie case and so obviate the necessity of evidence *aliunde*. Ib.

10. **Same: Interest: Penalty.** The rule that excludes the taxbill as prima facie evidence against the true owner until his name is legally inserted therein prevents the imposition of penalties upon him to the same time; so that interest which as provided in the statute is but a misnomer for penalty, can not be allowed against the true owner's interest in the lots until his name is legally inserted in the taxbill. Ib.

11. **Judgment: Interest.** The judgment on a taxbill bears interest at 6 per cent only. Ib.

TREES. See **Municipal Corporations,** 2.

TRUSTS AND TRUSTEES.

1. **Removal of Trustee: Divesting Title.** An order removing several testamentary trustees and appointing a new trustee in their stead will not have the effect of divesting one of the former trustees of title to certain land and investing the new trustee therewith, where such land was held by the former for himself and in trust for the other beneficiaries under the will, having been bought by him under the foreclosure sale of a mortgage given to secure funds of the estate, in the absence of apt words in the order removing the trustees, indicating an intention so to divest and invest title to that particular land. Coffman v. Gates, 475.

2. **Reimbursement for Defending Trust Property.** Where the holder of the legal title to real estate, one-third for himself and two-thirds in trust for other beneficiaries, employed counsel and expended money in defending ejectment suits for the land and paid a judgment for rents and profits accruing while he and his beneficiaries were in possession, he had a right to reimbursement from his *cestui que trust* for their proportion of the amount so expended. Ib.

3. **Same: Partition.** On the sale of such land in partition, under the jurisdiction of the circuit court to equitably adjust claims of parties in such proceeding, he is entitled to reimbursement out of the funds arising from such sale. Ib.

4. **Same.** He can not have a personal judgment against his *cestui que trust* for the amount expended, but is limited in the partition proceeding to the funds arising from the trust property. Ib.

VARIANCE. See **Common Carriers,** 6. 9, 10; **Pleading,** 8. 13.

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VENDOR AND VENDEE.

Shortage of Acreage: Demurrer to Evidence. The evidence relating to representations of the amount of acres in a land sale is examined and held sufficient to send the question to a jury. Leicher v. Keeney, 292.

VERDICT. See **Common Carriers**, 7.

WAIVER. See **Insurance**, 3; **Pleading**, 3; **Practice, Appellate**, 12, 21.

WARRANTY. See **Pleading**, 1; **Sales**, 1, 5, 6, 7, 8, 9, 10, 11.

WATER AND WATER COURSES.

1. **Levee: Damages for Negligent Construction: Defense.** In an action for damages to plaintiff's land by reason of the improper construction of a levee so that it obstructed the flow of a bayou which drained a lake, thus causing plaintiff's land to overflow, the defense that the plaintiff's land was subject to overflow unless protected by the levee and that the overflow which caused the damage came so late in the season that it would have caused the damage in any event, was not available. Bader v. St. Francis Levee District, 599.

2. **Same: The Issue.** The gravamen of the case was that the levee should have been built as not to obstruct the drainage of the lake and still have protected the land from overflow. Ib.

3. **Same: Limitations.** That the channel of the bayou had been obstructed many years before the damage in question occurred can not be considered as a defense in the absence of a pleading of the Statute of Limitations. Ib.

WILLS. See **Administration**, 4, 7, 9.

WITNESSES. See **Evidence**, 6, 7, 10; **Practice, Appellate**, 19; **Principal and Agent**, 2.

Falsus in Uno: Instruction: Willful. It is the willful or intentional false statement of a material fact that impeaches the credibility of a witness; and an instruction to the jury on that subject should so state. Johnson v. Powell, 249.

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Rules Governing Practice in the Kansas City Court of Appeals.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—DIMINUTION OF RECORDS. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

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RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—EVIDENCE—BILL OF EXCEPTIONS TO BE ALLOWED, WHEN. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—EXCEPTIONS—QUESTIONS TO BE EMBODIED IN BILL. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—DUTY OF CIRCUIT COURT CLERKS IN MAKING TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the* ——— *day of* ———, 188--, *executed on the* ——— *day of* ———, 188--;" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any

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abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—BILL OF EXCEPTIONS IN EQUITY CASES. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—ABSTRACT AND BRIEFS TO BE FILED AND SERVED. In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgement of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where

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the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 17.—APPELLANT'S BRIEF TO ALLEGE ERRORS COMPLAINED OF. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 19.—AGREED STATEMENT OF THE CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—MOTION FOR REHEARING. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the Court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

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Rule 22.—Extending Time for Filing Statements, Abstracts, Etc. In no case will extension of time for filing statements, abstracts, and briefs be granted, except upon affidavit showing satisfactory cause.

Rule 23.—Oral Arguments. When a cause is called for argument, the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

Rule 24.—Notice on Motion to Dismiss or Affirm. A party in any cause filing a motion, either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before mak- the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

Rule 25.—When Appeal is Returnable—Certificate of Judgment—Transcript. In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal *and not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason can not or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

Attest:

L. F. McCoy, Clerk.

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Rules of Practice in the St. Louis Court of Appeals.

REVISED OCTOBER 17, 1888.

TO BE IN FORCE NOVEMBER 1, 1888.

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room.

RULE 2.—MOTIONS. All motions in a cause shall be in writing signed by counsel and filed for record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the law library, and to no other place, and then they must leave written receipt therefor, but shall return such record to the Clerk's office within five days after taking the same.

RULE 5.—DIMINUTION OF RECORD. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

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RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS DISALLOWED BY TRIAL COURT. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue or fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given, and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the trial court.

RULE 11.—EXCEPTIONS TO ADMISSION OR EXCLUSION OF EVIDENCE. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—BILL OF EXCEPTIONS IN EQUITY CASES. In causes of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree on an abbreviated statement thereof.

RULE 13.—DUTY OF CLERK IN MAKING OUT TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the*

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regularity of the process or its execution, or to the acquiring by the Court of jurisdiction in the cause), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (*e. g.*): "*Summons issued on the* ——— *day of* ———, 188--, *executed on the* ——— *day of* ———, 188--;" and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter, touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 14.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the court of first instance, it shall be presumed as a matter of fact in all bills of exceptions that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14*a*.—ABSTRACTS IN LIEU OF TRANSCRIPTS WHEN FILED AND SERVED. In those cases where the appellant shall, under the provisions of section 2253, Revised Statutes of 1889, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing and shall in like time file four copies thereof with the Clerk of this Court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file four copies thereof with the Clerk of this Court. Objections to such complete or additional abstract shall be filed with the Clerk of this Court within five days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the appellant in like time.

RULE 14*b*.—COSTS FOR PRINTING ABSTRACTS AND RECORD. Costs will not be allowed either party for any abstract filed in lieu of a full transcript under section 2253, Revised Statutes 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order or decree instead of a full transcript, and in which the appellant shall file in this court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same (unless the court, upon an inspection of the record, should become satisfied that the printing of the entire record was unnecessary for a full understanding of the points presented). The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reason-

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ableness thereof; and, if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge.

RULE 15.—BRIEFS, WHEN TO BE FILED. In all civil cases the appellant, or plaintiff in error, shall file with the Clerk of the Court, at least one day before the cause is called for trial, four copies of a brief, containing: *First*. A clear and concise statement of the pleadings and facts shown by the record. *Second*. An enumeration in numerical order of the points or legal propositions made or relied on, accompanied by the citation of authorities supporting each proposition. *Third*. If he so elects, an argument supporting each proposition made or relied on.

"The appellant, or plaintiff in error, shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court four copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief as aforesaid, prepare, file and serve, a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk."

RULE 16.—BRIEFS AFTER SUBMISSION. After a cause has been submitted, or has been taken as submitted, no leave to file briefs will be granted, except upon good cause shown. Counsel obtaining such leave will be required to serve a copy of his brief on counsel on the other side, who shall have five days' time after such service to reply to the same. Evidence of such service shall be furnished, as required by the preceding rule.

RULE 17.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise the number of the edition, the volume, the chapter, the section, the paging and side paging shall be set forth.

RULE 18.—APPELLANT'S BRIEF TO ALLEGED ERROR COMPLAINED OF. The brief filed on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the errors committed by the inferior court,

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and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 19.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant, or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15 the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or at its discretion continue or reset the cause on proper terms. No oral argument will be heard from any counsel failing to comply with the provisions of rule 15.

RULE 20.—AGREED STATEMENT OF CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which may intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 21.—MOTIONS FOR REHEARING. Every motion for rehearing should be founded on suggestions of some party to the case, or of counsel, pointing out distinctly such grounds of error as are claimed to exist in the judgment of this court or in the opinion delivered. Such motion must be filed within ten days after delivery of the opinion of the court, and a copy of the motion, with any brief to be submitted in support thereof, shall be served upon the opposite party within the same period.

RULE 22.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said laws.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement; in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the

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commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party or his attorney of record, by telegram, by letter or by written notice of his proposed proceeding. When said adverse party or his attorney of record resides in the city of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the city of St. Louis, twenty-four hours' additional notice for each one hundred miles shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 25.—APPEARANCE OF COUNSEL. The counsel who represented the parties in the trial court, in any cause coming to this Court, will be held to represent the same parties, respectively, in this Court; but, should other counsel be engaged, they must enter their appearance in writing, the counsel for the appellant, or the plaintiff in error, ten days, and the counsel for the respondent, or the defendant in error, five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing of the counsel of the opposite party, to such appearance, be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

RULE 26.—In view of the rulings of the Supreme Court, confining the jurisdiction of this court in issuing original remedial writs to such cases wherein it has appellate jurisdiction, it is ordered: No original remedial writs, excepting such as are in aid of the appellate jurisdiction of this court and excepting also writs of habeas corpus and prohibition, will hereafter be issued by this court or any of the judges thereof, except in cases where the application of such writs can not be effectually presented to the Circuit Court or the Supreme Court, or some judge thereof. Nor will any writ of prohibition be issued in any case whereof the Supreme Court has appellate jurisdiction.

RULE 27.—Garnishees claiming any allowance in this Court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditure paid or incurred upon the appeal.

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